



Fundamental but Insufficient: Assessing the USDA Interim Final Rule Recalibrating the Supplemental Nutrition Program for Women, Infants, and Children Food Packages

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Abstract

The United States Department of Agriculture's Food and Nutrition Service division has promulgated an interim final rule which recalibrates and fundamentally alters the focus of the seven food packages available through the Supplemental Nutrition Program for Women, Infants, and Children (WIC). From one test site in Pineville, Kentucky, the WIC program now serves over half of all infants in the United States, approximately a quarter of all children ages one through four, and nearly one million adolescent and adult women. The addition of cash vouchers for the purchase of fruits and vegetables is the key change to the WIC food packages. To keep the program cost-neutral, cuts were made to monthly allowances for milk and other dairy products as well as for juice and eggs. Other changes were also made: the inclusion of more food alternatives for culturally-diverse WIC recipients, a focus on whole grains, and the inclusion of baby food and bananas for infants. Nonetheless, these changes, while fundamental, do not go far enough. FNS did not implement the fruit and vegetable benefit at the level recommended by scientists and nutritional experts. FNS also made unfortunate decisions which contradict sound nutrition science, such as the removal of white potatoes from the fruit and vegetable benefit and the exclusion of more culturally-diverse food substitutes, such as yogurt, from the revised packages. These trade-offs are the result of the FNS decision to prioritize serving as many qualifying participants as possible over fully meeting the needs those at the greatest nutritional risk. This paper first assesses the development of WIC and analyzes the proposed changes to the food packages, with a special emphasis on the fruit and vegetable benefit. This paper then argues that these changes are insufficient to combat the dual problems of obesity and malnutrition plaguing the neediest WIC participants and makes recommendations for future changes to the WIC program.

Introduction

Major changes are set to be implemented for one of the federal government's most significant feeding assistance programs: the Supplemental Nutrition Program for Women, Infants, and Children, or WIC. The United States Department of Agriculture's (USDA) Food and Nutrition Service division (FNS) has promulgated a final interim rule which dramatically alters the seven food packages, or monthly allotments of foodstuffs, available to qualifying WIC participants. The new rule recalibrates the food packages by adding a voucher for fruits and vegetables, emphasizing whole grains, adding some culturally-sensitive alternatives, and reducing the quantities of less healthful options, such as eggs and cheese. Unfortunately, the changes do not fully track the recommendations made by the Institute of Medicine (IOM), which FNS commissioned to make nutritional recommendations as to the recalibration of the food packages. In an effort to streamline administration of WIC benefits and to keep the changes cost-neutral to the program, filling the needs of those participants at the highest nutritional risk was deemphasized for the sake of serving as many participants as possible. FNS implemented the fruit and vegetable benefit at a level below where nutrition experts recommended and jettisoned potentially more culturally-sensitive and nutritious choices and alternatives to currently available foods. While the changes are a net positive to the program, they neither go far enough to curb the obesity epidemic sweeping the nation, which is hitting at-risk populations hardest, nor do they sufficiently alter WIC's misguided approach of under-serving the most at risk while over-serving others who may only need less or no assistance.

The rise of WIC

The tumultuous year of 1968 brought with it a new social consciousness of the nutritional and hunger problems facing poor Americans. Two years earlier, the Congress passed, and President Lyndon Johnson signed, The Child Nutrition Act of 1966 (CNA).¹ The CNA reauthorized the Special Milk Program, which provides free or subsidized milk to children in schools and other childcare facilities who do not participate in other federal nutritional assistance programs², and instituted the School Breakfast Program.³ Amidst the protests and movements which defined the year 1968, the documentary *CBS Reports: Hunger in America* raised the level of awareness among Americans about the failures of federal food assistance programs.⁴ The documentary, produced by Charles Kuralt and David Culhane, lambasted the Department of Agriculture for taking actions insufficient to stem the rising tide of hunger among the poor. *Hunger* accused USDA of incompetently choosing to return millions of dollars of its 1968 budget to the Department of the Treasury all the while farmers were set to slaughter and dispose of over 14,000 hogs due to the lack of market demand for their herds.⁵ The documentary also highlighted the insufficiency of USDA's program of redistributing surplus crops⁶ and claimed that the Department of Health, Education, and Welfare was better suited to administer federal food assistance programs than USDA, which *Hunger* portrayed as only competent to protect the

¹ Child Nutrition Act of 1966, 42 U.S.C. §§ 1771–1789 (2009)

² 42 U.S.C. § 1772; *see also* FOOD AND NUTRITION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, SPECIAL MILK PROGRAM FACT SHEET (2008), <http://www.fns.usda.gov/cnd/Milk/AboutMilk/SMPFactSheet.pdf>.

³ 42 U.S.C. § 1773.

⁴ E.J. Dionne, Jr., *Why do the poor so rarely make the news?*, S.F. CHRON., Aug. 31, 2007, at B-11.

⁵ Jack Gould, *TV: Hunger Amid Plenty*, N.Y. TIMES, May 22, 1968, at 95.

⁶ *Id.*, stating that the documentary “noted that surplus crops distributed by the United States Department of Agriculture were just a poor substitute for the dole. Surplus commodities do not constitute a balanced diet, such as green vegetables, eggs, meat, fresh milk or fruits. How much surplus butter can a human tolerate?”

interests of farmers.⁷ The documentary came under fire from the USDA as a “biased, one-sided, and dishonest presentation.”⁸

Nonetheless, the program seemed to have “successfully pricked the conscious of the viewing citizen.”⁹ Senator George McGovern (D–S.D.), who viewed the documentary, stated that it spurred him into action on the issue of hunger: “[i]t was 1968 and I remember saying, ‘Why are they looking at hunger in the United States?’ . . . I said to my family that was watching the documentary with me, ‘You know, it’s not that little boy who should be ashamed [about his inability to afford food at school], it’s George McGovern, a United States senator, a member of the Committee on Agriculture.’”¹⁰ Despite McGovern’s increased sentiment favoring more federal intervention in hunger issues, a large number of federal lawmakers, including W.R. Poage, the powerful chairman of the House Agriculture Committee, still lacked the impetus to confront the issue further.¹¹

⁷ *Id.* “The Department of Agriculture, the program observed, is designed to protect farmers, not destitute consumers.” *Id.*

⁸ *CBS Rebuffs Freeman on Broadcast*, N.Y. TIMES, May 30, 1968, at 50. USDA Director Orville Freeman also called the program “a real distortion in every sector” and “the greatest abuse ever seen on the tube—a real harm to the people it was ostensibly trying to help.” *Id.*

⁹ Gould, *supra* note 5. CBS President Dr. Frank Stanton stood behind the documentary as a “hard-hitting job of investigatory reporting.” *see CBS Rebuffs Freeman on Broadcast*, *supra* note 8.

¹⁰ Dionne, Jr., *supra* note 4, (quoting McGovern).

¹¹ *See, e.g.* Robert Sherrill, *What Can’t We Just Give Them Food?* N.Y. TIMES, Mar. 22, 1970, at 233, (describing the Congressional resistance)

Still the belief persists among most politicians that a person is hungry it must be because he is sinful and shiftless. This is the predominant philosophy in both Congressional farm committees, but it is found most acutely in the House Agriculture Committee, which reflects the religio-political creed of its chairman, W. R. Poage of Texas, who owns two farms and whose home state leads the nation both in the amount of Federal subsidies received by its farmers and in the number of counties which refuse to feed the needy.

One day during the food-stamp hearings last October [1969], a fascinating exchange took place between Chairman Poage and Stephen Kurzman, a Washington attorney who is special counsel to the Urban Coalition Action Council. It went, in part, like this:

Poage: People do not work for nothing. To go back even further than 2,000 years, go back somewhere in the dim past and the Book that most all of us accept, it says somewhere, ‘By the sweat at thy brow shalt thou eat bread.’ Now I think that is true, I think it is true when old Adam was kicked out, and I think it is still true. ‘By the sweat of thy brow’ means work, as I understand it. Now, I have not any objection to helping the individual who needs help, and I do not want you to go away from here and say that Bob Poage said that he would not help some poor

Despite this, the USDA and the McGovern-led Senate Agriculture Committee pressed ahead for assistance targeted beyond the other existing federal food programs. In 1968, the USDA established a trial program of food commissaries, attached to neighborhood clinics in several states and the District of Columbia, which would be stocked with food commodities.¹² These test programs incorporated mechanisms similar to those seen in the WIC program today. Medical staffs in these clinics would recommend certain foods to qualifying needy woman and hand her a prescription which served as a voucher for commodity assistance.¹³ The women would take the voucher to the nearby commissary to obtain a food package.¹⁴ Another voucher program to distribute foods in a Baltimore neighborhood also served as a model.¹⁵ Despite some early success, the USDA food commissary program saw mixed results and faced harsh criticism for its shortcomings.¹⁶ A March, 1970 Report praised the program's use of nutrition aides, but

widow and her kids. He never said anything of the kind. But he has said that he was not going to help some deadbeat who is sitting down at the pool hall waiting for his wife and kids to go out and see what the neighbors bring in.

Kurtzman: I do not think that the average \$6.75 a month that recipients of food stamps are now getting out of the general treasury constitute an overwhelming incentive to spend your life in a pool hall.

Poage: The point I am making is I have not understood why you and others who have appeared before this committee, who have a legitimate and proper concern for the needy, are also so concerned in maintaining a bunch of drones. You know what happens in the beehive, they kill those drones. That is what happens in most primitive societies. Maybe we have just gotten too far away from the situation of primitive men.

That last paragraph was stricken from the record and does not appear in the official transcript of the hearing, presumably because Representative Poage felt that some people might interpret it to mean he favors killing the people on Federal food programs.

Id.

¹² Victor Olivera, et al., Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture, *The WIC Program: Background, Trends, and Issues 7*, available at <http://www.ers.usda.gov/publications/fanrr27/fanrr27.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* This program grew independently of the USDA food commissaries program and was developed by Dr. David Paige of The Johns Hopkins University in Baltimore, Maryland. *Id.*

¹⁶ *Senate Panel Finds Antihunger Program Falling Short of Goal*, N.Y. TIMES, Mar 31, 1970, at 17 (finding that, "[i]n Detroit, where the program has been limited to indigent mothers and their children enrolled in designated maternal health programs, only 343 of 80,000 persons estimated to be eligible were participating. But in Nashville, where a preventive approach was being used, about 1,000 persons were being certified each month. In Willacy County, Tex., birth certificates were being required and only 207 of 1,336 eligible persons were enrolled.").

deemed them ineffective as a result of insufficient funding and the program's failure at seeking out the most needy geographical areas within a served area.¹⁷ The program faced particular difficulty serving needy participants on Native American reservations, foreshadowing problems that continue to plague WIC today.¹⁸

Despite these mixed results, the Congress pushed forward under the leadership of Senator Hubert Humphrey (D-MN). On September 26, 1972, the President formally authorized the WIC program as a two-year pilot demonstration program by amendment to the Child Nutrition Act of 1966.¹⁹ Congress delegated the responsibility for administering the supplemental food program to USDA and required nutrition risk, as determined by a health care professional, as a necessary factor for participant-eligibility.²⁰ Despite this Congressional mandate and swift signature from President Nixon, who had stressed the needs of the hungry since hosting a 4,000-delegate White House Conference on Food, Nutrition, and Health in 1970, USDA took over two years to develop the WIC program guidelines and implement the program's first test site in Pineville, Kentucky.²¹ In the interim, the USDA faced harsh criticism once again from the main proponent of the WIC amendment, Senator Humphrey. Humphrey accused the USDA of implementing the

¹⁷ *Id.* The Report noted that "The aides have nothing tangible to give—neither money nor food. Because they do not have resources to overcome this weakness, they are often prevented from performing their services, that of providing useful nutrition information." *Id.*

¹⁸ *Id.* (finding that, "[o]n the Navajo Indian reservation in Arizona, there were only two distribution centers on the reservation, which stretches 200 miles east and west and 150 miles north and south. Only 574 of 23,000 persons estimated to be eligible were receiving assistance."). For a summary of the current problems facing WIC on Native American reservations, see Kenneth Feingold, et al., The Urban Institute, Background Report on the Use and Impact of Food Assistance Programs on Indian Reservations 24–27, available at <http://www.ers.usda.gov/publications/CCR4/CCR4fm.pdf>.

¹⁹ Pub. L. No. 92-433, 9, 86 Stat. 724, 729 (1972) (authorizing the two-year pilot program at \$ 20 million per year); see also The WIC Program: Background, Trends, and Issues, *supra* note 12, at 7. The Senate had passed the bill authorizing the WIC program roughly a month earlier by a veto-proof vote of 67 to 16. See *Votes in Congress* N.Y. TIMES, Aug. 19, 1972, at 95.

²⁰ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 7. Despite this, "[n]o mention was made of providing nutrition education or health care referrals" in the original amendment. *Id.*

²¹ *Id.* at 7–8; see also Ann Veneman, U.S. Sec'y of Agric., Remarks to the National WIC Association Conference WIC 30th Anniversary (Mar. 16, 2004). The Pineville site opened on January 15, 1974. *Id.*

program at “tortoise speed” and sitting on its Congressionally-allocated \$20 million seed money for the 1973 fiscal year intended for the program.²² Nonetheless, WIC program sites were operational in 45 states by the end of 1974.²³ Despite his passionate advocacy for the WIC program, Senator Humphrey faced steep criticism during this period for his close ties to the dairy industry and his acceptance of illegal campaign contributions during the 1970 and 1972 campaign cycles from dairy interests such as the Associated Milk Producers, which resulted in his campaign manager’s imprisonment.²⁴

On October 7, 1975, WIC was established as a permanent program.²⁵ President Gerald Ford vetoed the legislation which was set to transform the pilot program into a permanent federal food program, but the program had become more popular within the Congress during its trial stages and both houses mounted a successful veto-override vote.²⁶ The bill extended categorical

²² *Humphrey Charges Lag in Giving Food To Infants of Poor* N.Y. TIMES, Jun. 8, 1973, at 10. Assistant Secretary of Agriculture Clayton Yuetter claimed that the delay was due to an intergovernmental debate over whether the Department of Agriculture or the Department of Health, Education, and Welfare would administer the program. Senator Humphrey also criticized the Department of Agriculture for requesting \$12 million to \$15 million less than Congress had initially allocated for the program for 1974. *Id.*

²³ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 8.

²⁴ Roy Reed, *Unflagging Despite Setbacks, He Championed Liberalism*, N.Y. TIMES, Jan. 14, 1978, at 47.

One of the disclosures of the Watergate scandal was that President Nixon had received large, illegal campaign contributions in 1972 from dairy co-operatives, particularly from the Associated Milk Producers Inc. of San Antonio, Texas. As part of the fallout from that investigation, it was revealed that Mr. Humphrey had received contributions from the same milk lobby over the years and that some of the contributions, especially some made during his 1968 Presidential race, were made from corporate funds and therefore were illegal. He freely acknowledged that he had received milk contributions for years, but said he had known of no illegal donations.

Mr. Humphrey’s campaign manager in 1970 and 1972, Jack L. Chestnut, was sentenced in June 1975 to four months in prison and was fined \$5,000 for accepting a \$12,000 illegal campaign contribution from Associated Milk Producers and arranging to pay a campaign bill from a New York advertising firm with the money. The previous August, Norman Sherman, Mr. Humphrey’s one-time press secretary, was fined \$500 after pleading guilty to having improperly used funds from the cooperatives to buy campaign mailing lists.

Id.

²⁵ National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511 (codified as amended in scattered sections of 42 U.S.C. (2009)).

²⁶ Nancy Hicks, *Suit Says U.S. Holds Up Funds To Feed Mothers and Children*, N.Y. TIMES, Mar 4, 1976, at 32. Senator McGovern described the Presidential veto and later attempts by the Ford Administration to include the WIC program in the Block Grant program for the 1977 fiscal year (and thus diminishing it as a priority within the budget)

eligibility for the WIC program to non-breastfeeding women and children 5 years of age and under and limited it to persons at nutrition risk and insufficient income.²⁷ Congress intended the program to be supplemental in nature and did not restrict recipients of Food Stamps or most other federal food programs from participating in WIC.²⁸ By the end of 1975, nearly 200,000 participants received WIC benefits.²⁹

The Child Nutrition Amendments of 1978 established a national income standard for WIC eligibility based on the qualifications for eligibility of children for reduced-price school lunches.³⁰ The 1978 standard was that a participant's household income must be at or below 195 percent of the federal poverty line. In 1981, the maximum income level for the WIC program and for reduced-price lunches was lowered to 185 percent of the federal poverty guidelines so as to include more participants in these programs.³¹ Moreover, the 1978 Amendments mandated the Secretary of Agriculture to ensure that fat, sugar, and salt content of the foods in WIC food packages were "appropriate."³² Also, the 1978 legislation harkened back to a successful element of the early pilot programs: it mandated nutrition education for all participants or their guardians and directed the USDA to spend no less than one-sixth of all WIC-allocated administrative funding on nutrition counseling and education.³³

as merely pandering to the "extreme right" in an attempt to "counter the Reagan threat." *Id.* McGovern also claimed that the Department of Agriculture in the Ford Administration had improperly impounded up to \$140 million in WIC-allotted funding: "[h]undreds of thousands of women, children and infants—including the unborn, for whom . . . President [Ford] otherwise professes so much concern—will be deprived of essential nutrition by the impoundment of funds and the misregulations proposed by U.S.D.A. in violation of the letter and spirit of the law." *Id.*

²⁷ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 8.

²⁸ *Id.* Participation in the Commodity Supplemental Food Program did disqualify participation in WIC. *Id.*

²⁹ COMMITTEE TO REVIEW THE WIC FOOD PACKAGES, FOOD AND NUTRITION BOARD, INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, WIC FOOD PACKAGES: TIME FOR A CHANGE 20 (2006).

³⁰ Pub. L. No. 95-627, 3, 92 Stat. 3603, 3612 (1978); see also The WIC Program: Background, Trends, and Issues *supra* note 12, at 8.

³¹ The WIC Program: Background, Trends, and Issues *supra* note 12, at 9 (Table 3).

³² *Id.* at 8.

³³ *Id.*

Other changes to the WIC program have since followed. State agencies are the backbone of the WIC program, as they have served to implement the program since the Reagan administration using federal funds given to the states via block grants.³⁴ To encourage the program to serve as many participants as possible, Congress required that all State agencies which administer the WIC program begin implementation of cost-containment contracts for the purchase of infant formula in 1989.³⁵ The 1989 legislation also signaled the formalization of USDA's incentivizing of breastfeeding; a priority which reached an apex in 1992 with the creation of Food Package VII for mothers who exclusively breastfeed their children.³⁶ The seven WIC food packages are each targeted toward a type of participant and encompass the total allotment of food credits which a participant receives per month.³⁷

Deficiencies of WIC

The WIC program has continued to grow steadily since the first Pineville test site: the program boasted and enrollment of approximately 8,705,000 participants in fiscal year 2008, with a total budget of \$6.209 billion.³⁸ Since fiscal year 2001, WIC expenditures have risen by nearly 50 percent.³⁹ Despite its large costs, the program is thought to save the federal government much more than it costs to administer. According to former Secretary of Agriculture

Ann Veneman, "[i]t is estimated that every dollar spend on WIC saves three dollars spent on

³⁴ Steven R. Weisman, *Reagan Aides Open Campaign to Sell 'New Federalism'*, N.Y. TIMES, Jan. 8, 1982, at A1.

³⁵ The WIC Program: Background, Trends, and Issues *supra* note 12, at 6, 9 (Table 3).

³⁶ *Id.* at 9 (Table 3).

³⁷ New WIC Food Packages Proposed: Preliminary Summary, <http://www.frac.org/html/news/newWICpack80406.html>. Other than the addition of Food Package VII, no changes have been made to the calibration or content of the food packages since 1980. *Id.*

³⁸ WIC Program Participation and Costs, <http://www.fns.usda.gov/pd/wisummary.htm>, (Mar. 26, 2009). Of the \$6.209 billion allocated for WIC in fiscal year 2008, \$4.5342 billion, or roughly 73 percent, went toward food costs while \$1.6133 billion, or roughly 27 percent, went toward nutrition services and other administrative costs. Roughly \$43.31 is spent per each WIC participant. *Id.* These figures do not include the totality of WIC agencies' cost savings via rebates for infant formula.

³⁹ *Id.* The WIC program cost the USDA \$4.1533 billion in fiscal year 2001.

Medicaid during a woman's pregnancy and the first 60 days of a child's life."⁴⁰ During the year 2000, approximately 54.2 percent of all infants in the United States, approximately 25.4 percent of all children ages 1 through 4, and nearly 900,000 adolescent and adult women received WIC assistance.⁴¹ In 2004, the USDA administered the WIC program in conjunction with 88 state, territorial, and tribal agencies, over 46,000 retailers, and 10,000 clinic sites.⁴² With such a large number of stakeholders in the program, any changes must be made with deliberative care and with a full understanding of the effects of a change for vendors, administrators, producers, and participants.

To qualify for WIC today, a potential participant must meet four eligibility factors. First, the potential participant must meet categorical eligibility requirements as either: a pregnant woman or a woman up to six weeks post-partum, a non-breastfeeding woman up to 6 months post-partum, a breastfeeding woman up to one year post-partum, an infant under the age of one, or a child who has not reached his or her fifth birthday.⁴³ Second, potential participants must reside within the state where they establish their eligibility and plan to receive WIC benefits.⁴⁴

Third, potential participants must meet income guidelines: potential participants' households may not earn over 185 percent of the Poverty Income Guidelines.⁴⁵ Problematically,

⁴⁰ Veneman, *supra* note 21. *But see* Douglas J. Besharov and Peter Germanis, *Is WIC as Good as They Say?* THE PUBLIC INTEREST, Jan. 1999, at 21, 31 (claiming that this figure is exaggerated and that WIC's actual impact is only "modest and probably concentrated among the most disadvantaged recipients[.]").

Secretary Veneman also claimed that the WIC "program is linked to health benefits such as reducing infant mortality, low birth-weight, premature births, and iron deficiencies in both mothers and babies." *Id.* Other studies claim that \$2.89 to \$3.50 is saved for every WIC dollar expended during the first 18 years of life. See Brandi M. King, *Separating Food from Culture: The USDA's Failure to Help Its Culturally Diverse WIC Population*, 6 DRAKE J. AGRIC. L. 223, 224 n. 27 and accompanying text. *See also* Bong Ju Lee, et al., Economic Research Service, U.S. Department of Agriculture, *Effects of WIC and Food Stamp Program Participation on Child Outcomes, Contractor and Cooperator Report No. 27, December 2006*, available at <http://www.ers.usda.gov/publications/ccr27/ccr27.pdf>.

⁴¹ TIME FOR A CHANGE, *supra* note 29, at 19, n. 2.

⁴² Veneman, *supra* note 21. The 88 agencies are comprised of agencies from all 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, the American Virgin Islands, and 34 Indian Tribal Organizations. *See* TIME FOR A CHANGE, *supra* note 29, at 22.

⁴³ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 2.

⁴⁴ *Id.*

some researchers claim that, while WIC agencies should take all income of a household into account, including shared income from grandparents, unmarried partners, and siblings of the potential participant, some count only the income of the nuclear family.⁴⁶ Also, most WIC agencies tend to use the lowest of the three yard sticks by which they may measure income status: weekly, monthly, or yearly income, instead of closely following the USDA's recommendation to choose an income level that "most accurately reflects" the yearly income of a family despite potential monthly ebbs and flows.⁴⁷ Income is also affected if a working mother who is not the only provider of a household takes time from her job to have the baby, resulting in some potential participants gaining income eligibility even though they would not qualify when the mother returns to work.⁴⁸ Typically, a participant must be recertified only every six months to continue receiving benefits.⁴⁹

Also problematic is the current state of adjunctive eligibility, which allows a potential participant to be deemed eligible for WIC if they are enrolled in another federal aid program, such as food stamps, Medicaid, or TANF.⁵⁰ While these programs also used the benchmark of 185 percent of the poverty line at one time, expansions of income eligibility requirements for the

⁴⁵ *Id.* Currently, all states have set the level of participation at 185 percent. Potential participants who are also enrolled in the Food Stamp, Medicaid, or Temporary Assistance for Needy Families (TANF) programs are automatically found to meet the income criteria for WIC eligibility. State agencies retain the option to deem potential participants as meeting the income criteria for WIC eligibility if they participate in another state-administered program that uses the cut-off of 185 percent of the Poverty Income Guidelines. *Id.* As of 2007, this figure is estimated at \$38,203 for a family of four. *WIC cases at all-time high locally*, HERALD TIMES REPORTER (MANITOWOC, WISC.), Dec. 14, 2007 at 1A.

⁴⁶ Douglas J. Besharov and Douglas M. Call, *The Expansion of WIC Eligibility and Enrollment: Good Intentions, Uncontrolled Local Discretion, and Compliant Federal Officials* 7, (Amer. Enterprise Inst., Working Paper Mar. 5, 2009).

⁴⁷ WIC Program Regulations, 7 C.F.R. 246.7(d)(2)(i) (2007); *see also id.* at 7–8.

⁴⁸ Besharov and Call, *supra* note 46, at 10.

⁴⁹ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 2–3. *See also id.* at 19 (noting that current WIC regulations do not require local agencies to disqualify potential participants whose income rises sharply, perhaps due to the mother returning to work after a pregnancy, during the certification period).

⁵⁰ Besharov and Call, *supra* note 46, at 8. The potential participant must "provide documentation of receipt of assistance" from one of the federal assistance programs to trigger adjunctive eligibility. *Id.* *See also* note 45, *supra*.

State Children's Health Insurance Program and Medicaid above the 185 percent level subvert the intention to cap WIC benefits at this already-generous level.⁵¹

Fourth, a health professional must find a potential participant to be at risk nutritionally,⁵² although WIC agencies have been widely known to find nearly every income-eligible applicant as nutritionally at risk.⁵³ To determine nutritional risk, an examination is performed that “involves measuring the applicant's height and weight, reviewing the applicant's medical history, and drawing blood to test for anemia” along with an assessment of the dietary habits described by the applicant to the WIC professional or non-affiliated health care worker.⁵⁴ Problematically, a 1997 report found that only roughly 80 percent WIC applicants were at risk nutritionally, an number much lower than those found to be at risk and therefore eligible for benefits.⁵⁵

Misaligned food packages

The WIC program is fundamentally targeted at nutritional supplementation: roughly 60 percent of WIC participants receive benefits from another federal assistance program.⁵⁶ Congress

⁵¹ *Id.* at 8–9.

⁵² The WIC Program: Background, Trends, and Issues, *supra* note 12, at 2. The USDA defines “nutrition risk” as meeting one of the five following types of risks:

(a) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements; (b) Other documented nutritionally related medical conditions; (c) Dietary deficiencies that impair or endanger health; (d) Conditions that directly affect the nutritional health of a person, including alcoholism or drug abuse; or (e) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, homelessness and migrancy.

WIC Program Regulations. 7 C.F.R. 246.2.

⁵³ Besharov and Call, *supra* note 46, at 9. This restriction was originally intended to moderate the low bar for income eligibility for WIC, something which has not occurred. *Id.* at 9–10.

⁵⁴ DOUGLAS J. BESHAROV AND PETER GERMANIS, RETHINKING WIC: AN EVALUATION OF THE WOMEN, INFANTS, AND CHILDREN PROGRAM 18 (2001).

⁵⁵ See Office of Analysis and Evaluation, Food and Nutrition Service, U.S. Department of Agriculture, Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Eligibility and Coverage Estimates 1997 Update (1999).

⁵⁶ 6 DRAKE J. ARGIC. L. at 224

most recently revised the definition under which all WIC-approved foods must fall in 2004, mandating that “Supplemental foods” are only:

those foods containing nutrients determined by nutritional research to be lacking in the diets of pregnant, breastfeeding, and post-partum women, infants, and children, and those foods that promote the health of the population served by the program authorized by this section, as indicated by relevant nutrition science, public health concerns, and cultural eating patterns, as prescribed by the Secretary.”⁵⁷

Before 2007, the foods and food categories available to WIC program participants were relatively limited and focused almost exclusively on their nutrient content: powdered, concentrated, or ready-to-feed infant formula, reconstituted frozen or single strength juice, infant cereal, hot or cold cereal, milk, cheese, eggs or dried egg mix, dried beans or peas and/or peanut butter, canned tuna, and fresh, frozen, or canned carrots.⁵⁸ The pre-2007 WIC food packages

⁵⁷ The Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 203, 118 Stat. 729, 771 (2004). Child Nutrition Act § 17, includes the following provisions in a section addressing state operations:

(f)(11) SUPPLEMENTAL FOODS—(A) IN GENERAL—The Secretary shall prescribe by regulation the supplemental foods to be made available in the program under this section. (B) APPROPRIATE CONTENT—To the degree possible, the Secretary shall assure that the fat, sugar, and salt content of the prescribed foods is appropriate.

Id.

⁵⁸ TIME FOR A CHANGE, *supra* note 29, at 24–25 (Table 1-1); *see also* The WIC Program: Background, Trends, and Issues, *supra* note 12, at 3 (Table 1, reproduced in full below).

focus not only on foods with important nutrients, but also almost exclusively on food high in calories, processed carbohydrates and cholesterol.⁵⁹ Under the pre-2007 food packages, a single mother with one child could receive one egg (which contains nearly all of the daily recommended value of 300mg of cholesterol) per day, every day, from the time of her pregnancy until her child's fifth birthday. If the same mother had a second child, she could receive another 30 eggs per month during that pregnancy until the second child's fifth birthday. For post-partum mothers and children over the age of one, the focus of the WIC food packages is almost exclusively dairy foods with high fat content (whole milk and cheese), non-meat sources of protein (beans and peanut butter, eggs), canned seafood (tuna), and refined carbohydrate-dense foods (juice and hot or cold cereal). This focus on high-fat dairy products for children violates

Food	WIC food packages						
	I Infants 0-3 months	II Infants 4-12 months	III Children/ women with special dietary needs	IV Children 1-5 years	V Pregnant & breastfeeding women	VI Nonbreastfeeding postpartum women	VII Breastfeeding women enhanced package ¹
Infant formula (concentrated liquid) ²	403 fl oz	403 fl oz	403 fl oz ³				
Juice (reconstituted frozen) ⁴		96 fl oz ⁵	144 fl oz	288 fl oz	288 fl oz	192 fl oz	336 fl oz
Infant cereal	24 oz						
Cereal (hot or cold)			36 oz	36 oz	36 oz	36 oz	36 oz
Milk				24 qt	28 qt	24 qt	28 qt
Cheese ⁶							1 lb
Eggs ⁷				2-2½ dozen	2-2½ dozen	2-2½ dozen	2-2½ dozen
Dried beans/peas and/or peanut butter ⁸				1 lb or 18 oz	1 lb or 18 oz		1 lb and 18 oz
Tuna (canned)							26 oz
Carrots (fresh) ⁹							2 lb

¹Available to breastfeeding women whose infants do not receive formula from the WIC program.
²Powdered or ready-to-feed formula may be substituted at the following rates: 8 lb powdered per 403 fl oz concentrated liquid; and 26 fl oz ready-to-feed per 13 fl oz concentrated liquid.
³Additional formula may be available up to 52 fl oz concentrated liquid or 1 lb powdered or 104 fl oz ready-to-feed.
⁴Single strength juice may be substituted at a rate of 92 fl oz per 96 fl oz reconstituted frozen.
⁵Infant juice may be substituted for adult juice at the rate of 63 fl oz per 92 fl oz single strength adult juice.
⁶A choice of various forms of milks and cheeses may be available. Cheese may be substituted for fluid whole milk at the rate of 1 lb per 3 qt, with a 4-lb maximum. Additional cheese may be issued in cases of lactose intolerance.
⁷Dried egg mix may be substituted at the rate of 1.5 lb per 2 dozen fresh eggs; or 2 lb per 2½ dozen fresh eggs.
⁸1 lb of dry beans/peas or 18 oz of peanut butter.
⁹Frozen carrots may be substituted at the rate of 1 lb per 1 lb fresh; or canned carrots at the rate of 16-20 oz canned per 1 lb fresh.

Id.

⁵⁹ Douglas J. Besharov, *We're Feeding the Poor as If They're Starving*, WASH. POST., Dec. 8, 2002, at B1. Besharov cites WIC food package IV as an example of this, claiming that the such a combination of foodstuffs is only sensible "if it is the family's major source of food, which almost certainly is not the case." *Id.*

the American Academy of Pediatrics' (AAP) recommendations: under the WIC milk allotment for children ages one through four, the child would receive 3.2 cups of whole milk until his fifth birthday.⁶⁰ This provision exceeds the daily recommendation for cow's milk to be consumed by children and goes against the AAP's recommendation of exclusively reduced-fat or non-fat cow's milk for children after their second birthday.⁶¹

The obesity pandemic

Unlike at the time of *Hunger*, the United States is currently facing a difficult and intricate dilemma which existing federal feeding programs were never intended to resolve: a large proportion of the population is undernourished but overweight. These misaligned food packages, combined with problems facing other federal feeding programs and informational and socio-economic issues, are unfortunately contributing to an obesity pandemic among populations served by WIC. The food stamps program, which provided up to \$465 per month for a household of four to nearly 20 million participants, disburses benefits via a credit card-like system or coupons.⁶² Unused food stamps have no cash value and cannot be redeemed, forcing participants to use the benefits on potentially-excessive amounts of food or lose the credits.⁶³ Some critics of the current system claim that disbursing food stamps or WIC vouchers via cash payments would sufficiently accomplish USDA's mission for the programs without encouraging excessive caloric consumption.⁶⁴

⁶⁰ TIME FOR A CHANGE, *supra* note 29, at 115, 155.

⁶¹ *Id.* at 115, 155. WIC formulations for cow's milk "contradict AAP recommendations of whole milk for children who are one year of age and fat-reduced milk for older children." *Id.*

⁶² Besharov, *supra* note 59.

⁶³ *Id.*

⁶⁴ *Id.* "Agriculture Department studies have demonstrated that 'cashing out' food stamps is more convenient for the poor and does not result in unhealthful diets of mismanagement of family finances. Recipients continue to get well above the recommended levels for most nutrients." *Id.*

The free school lunch and school breakfast programs are also problematic. Most WIC participants become eligible for these programs once they enter the public education system around the same time they lose WIC benefits. Unfortunately, these programs mandate that school children consume 58 percent of their recommended daily allowance of calories for the entire day from school breakfast and school lunch.⁶⁵ Feeding a child more than half of their daily recommended caloric intake by noon each day is no longer sensible when combined with WIC and other federal feeding programs, which are each targeted as supplemental but show characteristics of a program designed to be the primary food source for a mother and her child, especially for higher-income participants.

Obesity is becoming a more acute risk to the sub-groups eligible for WIC and other federal feeding programs.⁶⁶ 10.4 percent of children ages two through five were deemed overweight in 2002.⁶⁷ By comparison, 14.3 percent of lower-income children of the same age were deemed obese.⁶⁸ Data from a school nutrition pilot-program in Somerville, Massachusetts showed that 44 percent children in first, second, and third grades were either overweight or at serious risk of becoming overweight.⁶⁹ Such data suggests that alterations to public school breakfast and lunch programs, which Somerville has successfully made through its “Shape Up Somerville” program, are insufficient to fully combat childhood obesity because a large

⁶⁵ *Id.*

⁶⁶ New WIC Food Packages Proposed, *supra* note 37.

⁶⁷ *Overweight trends among children enrolled in WIC*, NUTRITION RES. NEWSL. vol. 25, no. 2 at 3 (2006)

⁶⁸ *Id.*

⁶⁹ *Nutrition Programs and the Economy, Hearing Before the S. Comm. On Agriculture, Nutrition, and Forestry*, 110th Cong. (2008) (statement of Eileen Kennedy, Dean, Friedman School of Nutrition Policy and Science, Tufts University).

proportion of children are already at risk for becoming overweight before they consume a single school-provided meal.⁷⁰

The misaligned pre-2007 food packages directly may be contributing to this growing obesity epidemic. While previous studies had not shown a correlation between WIC participants and increased weight as compared to non-WIC eligible populations, a recent study by the Economic Research Service for USDA found that “[i]n 1999-2002, boys from higher income families had significantly lower BMI and were significantly less likely to be at risk of overweight than WIC-participating boys.”⁷¹ While this was the only statistically significant difference found by the study between WIC participants and non-participants, many WIC-eligible families also receive food stamps, and:

mean BMI and probability of overweight and obesity are still very high among adult female food stamp participants. The gap between food stamp participants and nonparticipants has closed not because food stamp participants have lost weight, but because nonparticipants have caught up in weight with food stamp participants. . . . The Food Stamp and WIC Programs are two policy tools that could be used to remedy weight problems for those who are eligible and choose to participate. Expanding nutrition education through the Food Stamp and WIC Programs, or providing incentives to buy more fruits and vegetables . . . are changes that could be considered.⁷²

Such findings and the growing risk of obesity for WIC-eligible sub-groups highlight the need to recalibrate WIC food packages to encourage a more balanced and healthful diet among participants. Such a large and impactful government program should be used as a tool to

⁷⁰ *Id.* Kennedy suggested that “an improved WIC food package . . . based on more fruits, vegetables and whole grains . . . is a part of the solution.” *Id.*

⁷¹ Michele Ver Ploeg, et al., Economic Research Service, U.S. Department of Agriculture, Food and Nutrition Assistance Programs and Obesity: 1976-2002 22–23 (2007), *available at* <http://www.ers.usda.gov/Publications/ERR48/ERR48.pdf>. “Girls show no differences in BMI across WIC participation and income status. In 1988–94, moderate-income girls were *more* likely than WIC participants to be at risk of overweight. However, this difference was not present in 1999–2002.” *Id.* at 23.

⁷² *Id.* at 27. The study also states that “[t]he rates of overweight and obesity in the United States have risen to levels that warrant comprehensive evaluation of the causes of this problem, along with consideration of possible policy interventions to combat it.” *Id.*

encourage nutrition and well-being while still fostering participant choice and cultural sensitivity.

A lack of cultural sensitivity

The limited nature of foodstuffs included within the pre-2007 WIC food packages, which USDA often selected solely for nutritive content, cost, and administrative feasibility,⁷³ falls short of meeting the dietary preferences and needs of cultural minorities eligible for benefits. The pre-2007 food packages failed to include some potentially more culturally-appealing food stuffs, such as rice, tofu, and yogurt, because each was said to lack enough nutritional similarities to cereal or cow's milk.⁷⁴ Despite these concerns, certain cultures have vastly different dietary needs and preferences which could stifle the efficacy of such limited foodstuff options. Many cultures do not include dairy products such as cow's milk and cheese in their traditional dietary patters.⁷⁵ Asians, for example consume much less in dairy products than average Americans. Calcium and other nutrients traditionally derived from dairy are instead derived from tofu and soybean-based products.⁷⁶ Rice is the most common grain staple in Asian diets, as with South Asian and most Latin-American cultures, and many members of these cultures have not adopted the American emphasis on processed cereal grains into their diets⁷⁷ Lactose intolerance is also higher in Native American and Mexican populations, which contradicts WIC's heavy emphasis on dairy products.⁷⁸ Fruits, vegetables, and various legumes are also traditionally common foods

⁷³ Accommodation of Cultural Food Preferences in the WIC Program, 59 Fed. Reg. 32,406, 32,406 (1994).

⁷⁴ 6 DRAKE J. ARGIC. L. at 231. "The USDA cited a number of problems with tofu, including the insufficient amount of calcium contained in it and no guarantee that it would be bacteria-free due to the lack of FDA regulation over the product. The USDA conceded that yogurt is nutritionally comparable to milk, but then mentioned that because many yogurts are flavored, they tend to have added sugar. Rice was attacked for not containing enough iron or other target WIC nutrients." *Id.* (internal citations omitted).

⁷⁵ TIME FOR A CHANGE, *supra* note 29, at 119.

⁷⁶ 6 DRAKE J. ARGIC. L. at 229.

⁷⁷ *Id.* at 228–229.

⁷⁸ *Id.* at 228.

in both of these cultures, but most of these items fell outside of WIC's pre-2007 food packages⁷⁹ Hispanic diets as well as South Asian diets also emphasize unleavened breads over processed cereals, although Native Americans have mostly adopted processed breads and cereals into their diets.⁸⁰ Again, members of these cultures must choose between unsubsidized traditional preferences and WIC-provided selections. The pre-2007 food packages clearly failed to fully meet the needs of the nearly 50 percent of WIC participants from a cultural sub-group.⁸¹

The Study, the Rule, and disregard for nutrition science

In September of 2003, the Food and Nutrition Service (FNS) of the USDA requested the Institute of Medicine (IOM) of The National Academies to undertake a comprehensive review of the WIC food packages in light of the aforementioned criticisms of the WIC program. The FNS outlined the key factors for IOM to consider when making its recommendation:

The committee's focus is the population served by the . . . WIC program[. . .]. The Phase II task is to recommend specific changes to the WIC food packages. *Recommendations are to be cost-neutral, efficient for nationwide distribution and vendor checkout, non-burdensome to administration, and culturally suitable.* The committee will also consider the supplemental nature of the WIC program, burdens and incentives for eligible families, and the role of WIC food packages in reinforcing nutrition education, breastfeeding, and chronic disease prevention.⁸²

The focus on efficiency of distribution and administration and, most importantly, cost-neutrality meant that the IOM had to offset any cost increases caused by its recommendations with other

⁷⁹ *Id.*

⁸⁰ *Id.* at 228–229.

⁸¹ *Id.* at 234. Senator Diane Feinstein (D–CA) concurred in this concern: “USDA nutrition policy should consider the totality of U.S. eating habits and aim for consumer education and program implementation that deals with a person's overall diet rather than one burdened by requirements attached in a piecemeal fashion.” 145 Cong. Rec. 24,919 (1999) (statement of Sen. Feinstein).

⁸² TIME FOR A CHANGE, *supra* note 29, at 21 (emphasis added). Phase I of the study tasked the committee to “review nutritional needs, using scientific data summarized in Dietary Reference Intake reports . . .; assess supplemental nutrition needs by comparing nutritional needs to recent dietary intake data for pertinent populations; and propose priority nutrients and general nutrition recommendations for the WIC food packages.” *Id.* The findings from Phase I of the study were released in 2004. *Id.*

changes in the food packages.⁸³ IOM's task was one of recalibration and not simply addition: layering additional foodstuffs above the pre-2007 food packages was not an option.

In 2004, IOM developed a set of six criteria to apply when redesigning each food package: The first criterion is that "[t]he package reduces the prevalence of inadequate and excessive nutrient intakes in participants."⁸⁴ The IOM stressed the need to consider the critical balance between WIC participants who suffer from malnutrition with concerns of obesity.⁸⁵ Second, "[t]he package contributes to an overall dietary pattern that is consistent with the Dietary Guidelines for Americans for individuals 2 years of age and older."⁸⁶ Third, "[t]he package contributes to an overall diet that is consistent with established dietary recommendations for infants and children younger than 2 years of age, including encouragement of and support for breastfeeding."⁸⁷ Fourth, "[f]oods in the package are available in forms suitable for low-income persons who may have limited transportation, storage, and cooking facilities."⁸⁸ Fifth, "[f]oods in the package are readily acceptable, widely available, and commonly consumed; take into account cultural food preferences; and provide incentives for families to participate in the WIC

⁸³ This IOM found that its changes had little effect on the program's post-rebate cost:

A cost-neutral set of proposed changes would be such that the post-rebate average cost per participant of the set of revised packages is close to that of the current average post-rebate average cost per participant. Thus, the basis of comparison is the committee's estimate of an average 2002 cost per participant for the current food packages of \$34.76 per month. The average 2002 cost of the revised food package is estimated to be \$34.57 per participant per month—approximately equal to the current set of packages (\$0.19 less than that of the current set of food packages, a difference of less than 1 percent of the average participant cost of the set of current packages).

Id. at 135.

⁸⁴ *Id.* at 37.

⁸⁵ *Id.*

⁸⁶ *Id.* at 38.

⁸⁷ *Id.*

⁸⁸ *Id.* at 38–39. The committee determined that "Foods are not suitable for WIC food packages if two conditions apply: (1) they are particularly susceptible to contamination by organisms that cause foodborne illness; and (2) they result in serious adverse effects that are specific to a population that benefits from the WIC program." *Id.* at 39. The IOM cited the exclusion of luncheon meats, hot dogs, and soft cheeses from its recommended food packages because of the high risk and severe consequences of listeriosis. *Id.*

program.”⁸⁹ Lastly, “[f]oods will be proposed giving consideration to the impacts that changes in the package will have on vendors and WIC agencies.”⁹⁰ With these criteria, the IOM committee set out not only to alter this critical federal feeding program, but also to improve “the nutrition and health of the nation’s low-income pregnant women, new mothers, infants, and young children.”⁹¹

Nutrient intake

The IOM found that many WIC participants were not receiving sufficient levels of key nutrients under the pre-2007 food packages. The IOM analyzed multiple data sets from 1994 through 2005 to estimate the percentage deficiency for key nutrient for each of the WIC subgroups. Among breastfed infants between the ages of 6 and 11.9 months, 60.3 percent lack sufficient zinc intake and 39.5 lack sufficient iron intake.⁹² Children between the ages of one and 1.9 years show a significant lack of vitamin E (55.9 percent prevalent) and, to some degree, niacin (2.5 percent prevalent).⁹³ For children between the ages of two and 4.9 years, vitamin E is

⁸⁹ *Id.* at 40. The IOM stressed that “WIC-authorized foods need to fit the lifestyle of both employed and non-employed pregnant women and mothers of small children.” *Id.* The committee also found that “WIC participants are no more likely to desire or be able to spend considerable time in food preparation than the rest of the population. Suitable items . . . not pose a heavy burden of food preparation for employed parents.” *Id.*

⁹⁰ *Id.* at 43.

⁹¹ *Id.* at 17.

⁹² *Id.* at 48, (Table 2-1). *But see* Barbara Devaney et al., Economic Research Service, U.S. Department of Agriculture, Assessing the Nutrient Intakes of Vulnerable Subgroups 51 (2005), finding that only “7.1 percent of WIC infants 7 to 11 months of age have inadequate intakes compared with 17.2 percent of income-eligible nonparticipants.”

⁹³ TIME FOR A CHANGE, *supra* note 29, at 49 (Table 2-2); *see also id.* at 274–283 (Tables C-2A–C-2G). “WIC children have adequate intakes of all micronutrients except vitamin E.” *Id.* at 47.

again the major deficiency (47.9 percent prevalent).⁹⁴ Despite these deficiencies, infants and children receiving WIC benefits consume more calories than suggested levels.⁹⁵

The picture is far dire for pregnant and lactating women between the ages of 14 and 44. Intake of certain key nutrients is lacking among a quarter or more among this WIC subgroup as to vitamin E (94.4 percent prevalent), magnesium (49.4 percent prevalent), folate (41.5 percent prevalent), vitamin B6 (34 percent prevalent), vitamin C (32.7 percent prevalent), vitamin A (31.2 percent prevalent), and zinc (24.5 percent prevalent).⁹⁶ A smaller but still significant percentage of this group also lacks sufficient intake of thiamin (17.2 percent prevalent), protein (17.1 percent prevalent), niacin (8.1 percent prevalent), iron (7.5 percent prevalent), and riboflavin (3.8 percent prevalent).⁹⁷ The intake for non-breastfeeding postpartum women is the most insufficient as to key nutrients. Women in this subgroup lack a sufficient intake of vitamin E (98.8 percent prevalent), magnesium (87.5 percent prevalent), vitamin A (44.1 percent prevalent), and vitamin C (42.2 percent prevalent).⁹⁸ A smaller but still significant percentage of this group also lacks sufficient intake of vitamin B6 (17.1 percent prevalent), folate (12.0 percent prevalent), iron (8.5 percent prevalent), vitamin B12 (6.6 percent prevalent), and protein (4.2 percent prevalent).⁹⁹

⁹⁴ *Id.* at 49 (Table 2-2); *see also id.* at 274–283 (Tables C-2A–C-2G). *See* Assessing the Nutrient Intakes of Vulnerable Subgroups, *supra* note 92, at 51, finding that “[d]ifferences in nutrient adequacy for WIC participants and nonparticipants show that infants and toddlers participating in WIC generally have higher mean intakes, as well as higher usual intake percentiles, than income-eligible nonparticipants For most nutrients, however, the prevalence of inadequacy is low and differences between WIC participants and income eligible nonparticipants are not large.”

⁹⁵ Assessing the Nutrient Intakes of Vulnerable Subgroups, *supra* note 92, at 53–54 (Table 8-b). “For infants and children receiving WIC, and for eligible nonparticipating children, mean energy intake exceeds [the] mean [Estimated Energy Requirement].” *Id.*

⁹⁶ TIME FOR A CHANGE, *supra* note 29, at 49 (Table 2-2); *see also id.* at 274–283 (Tables C-2A–C-2G).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

Data concerning the macronutrients calcium, potassium, and fiber also highlight the miscalibrated nature of the pre-2007 food packages. The data suggest that all infants and children participating in WIC received more calcium than the level deemed as an Adequate Intake¹⁰⁰ and, in some cases, nearly three times as much calcium.¹⁰¹ Infants also consumed higher than adequate amounts of potassium, although after the child's first birthday, potassium intake fell to only two-thirds of the Adequate Intake level for the remainder of the child's participation in WIC.¹⁰² Fiber intake is equally problematic for children over age one, many of whom displayed intakes of roughly half of the Adequate Intake requirement.¹⁰³ The mean usual intake for pregnant or breastfeeding mothers for macronutrients is more troubling, and the members of this sub-group take in below the Adequate Intake level for calcium, potassium, and fiber.¹⁰⁴ The same is true for non-breastfeeding postpartum women.¹⁰⁵

Fruits and vegetables

¹⁰⁰ "Although mean intakes below the [Adequate Intake] do not necessarily imply nutrient inadequacy, when mean intakes are far below the AI, concerns about nutrient adequacy may arise." *Id.* at 49.

¹⁰¹ *Id.* at 50 (Table 2-3). "For WIC infants and children, mean calcium intakes exceeded the Adequate Intake (AI)." *Id.* at 49. For example, WIC infants six to 11.9 months of age had a mean usual intake of 722mg per day of calcium, while the Adequate Intake for a participant within that age range is 270mg per day of calcium. *Id.* at 50 (Table 2-3).

¹⁰² *Id.* at 50 (Table 2-3). "Intakes of potassium . . . were low for all subgroups one year of age or older." *Id.* at 51.

¹⁰³ *Id.* at 50 (Table 2-3). "Intakes of . . . fiber were low for all subgroups one year of age or older." *Id.* at 51. *See also* Assessing the Nutrient Intakes of Vulnerable Subgroups, *supra* note 92, at 55, finding that "[b]oth participants and income-eligible nonparticipants [between the ages of 1 and 3 years] have usual dietary fiber intake distributions that do not come close to meeting fiber recommendations."

¹⁰⁴ TIME FOR A CHANGE, *supra* note 29, at 50 (Table 2-3) (pertinent section reproduced below).

Table 2.3: Adequate Intakes and Mean Reported Usual Intakes of Calcium, Potassium, and Fiber
Women, pregnant or lactating, age 14–44

	Calcium (mg/d)	Potassium (mg/d)	Fiber (g/d)
AI	1,300 (pregnant) / 1,000 (lactating)	4,700 (pregnant) / 5,100 (lactating)	28 (pregnant) / 29 (lactating)
Mean Usual Intake	956	2,909	18

¹⁰⁵ *Id.* (pertinent section reproduced below).

Table 2.3: Adequate Intakes and Mean Reported Usual Intakes of Calcium, Potassium, and Fiber
Women, non-breastfeeding, postpartum, age 14–44

	Calcium (mg/d)	Potassium (mg/d)	Fiber (g/d)
AI	1,300 (ages 14-18) / 1,000 (ages 19-44)	4,700	26 (ages 14-18) / 25 (ages 19-44)
Mean Usual Intake	668	2,086	12

The average American consumes roughly half of the recommended daily amount of fruits and vegetables.¹⁰⁶ Nonetheless, the pre-2007 WIC food packages were not designed to encourage consumption of fruits and vegetables. Under the pre-2007 WIC food packages, fruits and vegetable offerings were quite limited. The only fresh vegetable offered was 2 pounds of carrots to breastfeeding women whose children received no infant formula from WIC under food package VII.¹⁰⁷ Vitamin C-rich juice was available to women in all food packages and to infants and children beginning at age four months.¹⁰⁸ Nonetheless, the AAP recommends that infants younger than six months receive no fruit juice while children ages one through six should limit their juice intake to only four to six ounces daily.¹⁰⁹ The AAP also advises that children meet their daily fruit intake recommendations by eating whole fruits instead of from fruit juices.¹¹⁰ Not only does increasing whole fruit intake over fruit juice decrease processed sugar consumption, but it also increases dietary fiber intake.¹¹¹

Commentators had suggested introducing fruits and vegetables into WIC food packages for years.¹¹² Changes in the food supply since the pre-2007 food packages were developed allow vendors to more easily incorporate fruits and vegetables into WIC. The introduction of constant-weight packages for fruits and vegetables, which were formerly sold exclusively in bulk, allows

¹⁰⁶ Hayden Stewart and Noel Blisard, Economic Research Service, U.S. Department of Agriculture, Are Lower Income Households Willing and Able To Budget for Fruits and Vegetables? 1 (2008), finding that:

Americans do not consume enough of [fruits and vegetables] to satisfy the recommendations in the *Dietary Guidelines for Americans*. For a 2,000- calorie reference diet, the Guidelines recommend that people consume 2 cups of fruit and 2.5 cups of vegetables daily. But, according to the most recent statistics, Americans eat only about 0.83 cups of fruit and 1.72 cups of vegetables, on average.

Id.

¹⁰⁷ The WIC Program: Background, Trends, and Issues, *supra* note 12, at 3 (Table 1)

¹⁰⁸ *Id.*

¹⁰⁹ TIME FOR A CHANGE, *supra* note 29, at 69 (Table 2-9).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 78 (Table 3-1). The committee also determined that “[f]or infants age 6–11.9 mo, fruit juice has no nutritional benefit over whole fruit.” *Id.*

¹¹² See, e.g., Besharov, *supra* note 59 (suggesting that “[i]t would be better to use the package to introduce low-income families to more healthful foods, such as fruits and vegetables.”).

these items to more easily be incorporated into the WIC program.¹¹³ The explosion of international trade in the time since the last food package revision in 1980 has resulted in the year-round availability of many more fresh fruit and vegetable varieties and a wider dissemination of those varieties among more retail vendors.¹¹⁴ Almost 75 percent of comments received by FNS during the notice-and-comment period beginning in 2003 stated that fruits and vegetables should be added to the WIC food packages.¹¹⁵ FNS received 40,026 comment letters regarding the proposed introduction of fruits and vegetables into the WIC program, of which 39,961 were positive.¹¹⁶

The IOM committee also considered the potential increases in costs for WIC vendors if fruits and vegetables were added to the food packages. Smaller vendors and those in more rural areas could be faced with the increased costs associated with more frequent, smaller deliveries of perishable produce.¹¹⁷ Some vendors may need to increase their refrigeration capabilities as well to handle an increased number of perishable items if their establishment does not turn over merchandise rapidly enough to ensure freshness.¹¹⁸ Nonetheless, fruits and vegetables are high-margin items for retailers, so increased costs could be offset.¹¹⁹

WIC may also be an ideal mechanism in which to implement benefits that can be used only for fruits and vegetables. A recent study has found that individuals eligible for both WIC and Food Stamps consume a lower amount of fruits and vegetables than higher-income individuals and that the amount of produce which they purchase does not increase even with a 10

¹¹³ TIME FOR A CHANGE, *supra* note 29, at 30.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 35.

¹¹⁶ Revisions in the WIC Food Packages; Interim Rule, 72 Fed. Reg. 68,966, 68,969 (Dec. 6, 2007). “The majority of the few opposing comments were from participants who did not want to see any changes to the current WIC food packages.” *Id.*

¹¹⁷ TIME FOR A CHANGE, *supra* note 29, at 44.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

percent increase in household income.¹²⁰ However, families eligible only for WIC but not Food Stamps displayed an increased willingness to purchase more fruits and vegetables with a 10 percent increase in household income.¹²¹ Nonetheless, WIC participants earning below 130 percent of the poverty line may be unwilling to increase their expenditures on fruits and vegetables without a dedicated allocation which could be used only for such produce. After its analysis, the IOM recognized that fruits and vegetables are critical for sustained health, a balanced diet, and are ideal source of many of the priority nutrients identified by USDA.¹²²

Monthly allowances

After its analysis, the IOM proposed adding fruits and vegetables to packages III, IV, V, VI, and VII through a cash-value voucher system for fruits and vegetables¹²³. The IOM also proposed adding baby food fruits and vegetables to package II.¹²⁴ Two pilot programs which used fruit and vegetable vouchers totaling \$40 per month were largely successful and “(1) increased the intakes of fruits and of vegetables, (2) added variety to the diets of WIC participants, and (3) was highly acceptable to WIC participants of various ethnic/cultural

¹²⁰ Are Lower Income Households Willing and Able To Budget for Fruits and Vegetables?, *supra* note 106, at 10 (Table 2), 14. The study found “that low-income households spend less on fruits and vegetables, as well as on most other types of foods. However, a small increase in income will not likely induce them to spend more on fruits and vegetables. Spending on beef and frozen prepared foods does increase, and therefore may be a priority.” *Id.* at 14.

¹²¹ *Id.* at 10 (Table 2). The study also found that “households earning above 130 percent of the poverty line appear to behave differently than households who are income eligible for the Food Stamp Program. Among the former, [the study] found a positive association between the receipt of additional income and fruit/vegetable demand; among the latter, [the study] failed to find such an association.” *Id.* at 14.

¹²² TIME FOR A CHANGE, *supra* note 29, at 101–102. According to their report:

The basis for [IOM’s] recommendation [is rooted in] the substantial body of literature that supports the association of fruit and vegetable consumption with reduced risk of chronic disease including stroke and perhaps other cardiovascular diseases, some cancers, and type 2 diabetes. Evidence also suggests that increased fruit and vegetable consumption may be useful in programs to promote and sustain loss of body weight in overweight individuals. In addition, increased consumption of fruits and vegetables helps promote nutritional adequacy and may displace less nutritious items in the diet.

Id. at 102 (internal citations omitted).

¹²³ *Id.* at 101.

¹²⁴ *Id.* at 94. “For infants beginning at 6 months of age, the committee recommends the inclusion of commercial baby food fruits and vegetables and fresh bananas. Fresh bananas may be substituted for baby food fruits at the rate of approximately one fresh banana per four ounces of commercial product.” *Id.* at 103.

backgrounds.”¹²⁵ Due to the cost-neutrality provision, the IOM proposed monthly vouchers in the amount of \$10 for women receiving food packages V, VI, and VII and \$8 for children receiving food package IV.¹²⁶ IOM proposed adding fruits and vegetables in the form of baby foods for infants receiving food package II.¹²⁷ To make room for these additions, the IOM recommended a dramatic reduction in the amount of vitamin-rich juice available in each food package along with other cut backs to the quantity of milk and eggs.¹²⁸ The scientists and nutritionists on the IOM committee developed a sensible policy suggestion which took into account the needs of the WIC program and its vendors and administrators while putting the health of WIC’s participants at the highest priority. This well reasoned suggestion is not extravagant: a \$10 voucher would allow a mother to buy roughly 30 bananas, or merely one piece of fruit per day, for the month.¹²⁹

Nonetheless, the FNS followed only IOM’s recommendations as to the addition of fruits and vegetables to WIC food packages and not as to the amounts of the vouchers. FNS proposed monthly vouchers in the amount of \$8 for women receiving food packages V, VI, and VII and \$6 for children receiving food package IV, citing the importance of cost-neutrality in the program

¹²⁵ *Id.* at 102. Little to no abuse of the voucher pilot programs was found. *Id.*

¹²⁶ *Id.* at 90–91 (table 4-2). The committee also recommended certain substitutions for this benefit:

Processed fruits and vegetables may be substituted for fresh fruits and vegetables Dried fruits may be included with processed fruits only for adolescent and adult women. In the canned options for children, 222 oz of canned fruits and vegetables (e.g., 7 15-oz cans of fruit plus 7 14.5-oz cans of vegetables) would substitute for the \$8.00 cash-value vouchers. In the canned options for adolescent and adult women, 280 oz of canned fruits and vegetables (e.g., 9 15-oz cans of fruit plus 9 14.5-cans of vegetables) would substitute for the \$10.00 cash-value vouchers. The value of the cash voucher is intended to deliver approximately the weight of fresh produce specified and may need to be adjusted upward to account for local prices in some states agencies.

Id. at 92 (Table 4-2, notes l–n).

¹²⁷ *Id.* at 88–89 (Table 4-1). The committee proposed an allotment of 128 ounces for formula-fed and partially breastfed infants between the ages of 6 and 11.9 months and 256 ounces for fully breastfed infants between the ages of 6 and 11.9 months. *Id.*

¹²⁸ *Id.* at 90–91 (Table 4-2).

¹²⁹ Assuming an average price of \$0.33 per banana.

and the need to keep benefits available to as many potential participants as possible.¹³⁰ In reaction to this interim rule, 3,166 comment letters urged an increase in the amount of the vouchers for fruits and vegetables, citing “(1) the important benefits of fruits and vegetables in decreasing high blood pressure, heart disease, obesity, and cancer; (2) the generally[-]low consumption of fruits and vegetables among WIC participants; and (3) the role that WIC can play in helping participants meet the [daily recommendation] for fruit and vegetable intake.”¹³¹ Other commenters, such as the American Public Health Association, suggested an increase of the monthly voucher for fruits and vegetables to \$10 for package VII (fully-breastfeeding women) and those fully-breastfeeding women receiving food package III so as to encourage this practice further.¹³² This suggestion was adopted by the FNS in the final interim rule.¹³³ Nonetheless, this change is insufficient to overcome FNS’s disregard for nutritional science and the important benefits of encouraging more fruit and vegetable intake. By granting the same benefit to participants above 130 percent of the poverty line, who are more likely to purchase fruits and vegetables without such a targeted benefit than participants below 130 percent of the poverty line,¹³⁴ FNS risks attempting to reach so many participants that it results in helping no one at all.

¹³⁰ 72 Fed. Reg., *supra* note 116, at 68,989.

¹³¹ *Id.* Commenters also encouraged “FNS to seek additional funds to provide the cash-value vouchers at the level recommended by IOM” instead of retaining the lower levels for fruits and vegetables in the interim rule, *Id.* See also Editorial, *Government’s food basket penny foolish*, DAYTON DAILY NEWS, Aug. 18, 2006, at A18 (commenting that the reduction of fruit and vegetable benefit amounts is “contrary to the best medical advice the government sought.”).

¹³² 72 Fed. Reg., *supra* note 116, at 68,989. 692 total letters made this suggestion. *Id.* See also APHA applauds WIC food package changes, 37 THE NATION’S HEALTH 2 (2007).

¹³³ 72 Fed. Reg., *supra* note 116, at 68,989. Any further changes were not acceptable: “[w]hile FNS is in full agreement with the IOM and commenters regarding the benefits of fruits and vegetables . . . it is important that revisions to the WIC food packages be cost neutral to protect the program’s ability to serve the greatest number of eligible women, infants, and children.” *Id.*

¹³⁴ Are Lower Income Households Willing and Able To Budget for Fruits and Vegetables?, *supra* note 106, at 10 (Table 2), 14.

Moreover, IOM took the cost-neutrality guideline seriously when determining at what level to value its proposed vouchers.¹³⁵ The committee determined that the cost of the revised food packages in 2002 would be \$34.57, as compared to an average cost of \$34.76 for the pre-2007 food packages, which represents only a one percent deviation.¹³⁶ IOM utilized well-respected sources of data, such as the Economic Research Service, ACNielsen Homescan, and the Bureau of Labor Statistics of the U.S. Department of Labor, for determining average prices in its analysis.¹³⁷ IOM determined an average cost for both fresh and canned fruits and vegetables¹³⁸ and then assumed that 50 percent of the voucher would be expended on fresh items and 50 percent on canned items to derive an average cost of \$0.82 per pound. FNS utilized similar sources for its data, but come to very different conclusions as to the average costs of a large number of items. While FNS calculated the average costs for some foods at a lower amount than IOM (namely adult cereals, eggs, and whole-grain bread),¹³⁹ FNS used slightly to significantly higher average costs for calculating some of the most widely-distributed WIC items, including infant food fruits and vegetables, infant food meat, whole milk, reduced fat milk, juice, dry beans, tuna, and other canned fish.¹⁴⁰ FNS also chose not to accept all of the

¹³⁵ TIME FOR A CHANGE, *supra* note 29, at 135. The committee defined cost-neutral as follows:

A cost-neutral set of proposed changes would be such that the post-rebate average cost per participant of the set of revised packages is close to that of the current average post-rebate average cost per participant. Thus, the basis of comparison is the committee's estimate of an average 2002 cost per participant for the current food packages of \$34.76 per month.

Id.

¹³⁶ *Id.*

¹³⁷ *Id.* at 349.

¹³⁸ *Id.* at 346. IOM estimated fresh fruit ~0.69/lb., canned fruits ~0.05/oz., fresh vegetables ~0.94/lb., canned vegetables ~0.03/oz. *Id.*

¹³⁹ Compare *id.* at 342–349 (Table E-3A and Table E3B) with 72 Fed. Reg., *supra* note 116, at 69,022 (Table 6) (IOM calculated adult cereals at \$0.20/oz while FNS used \$0.159/oz; IOM calculated eggs at \$1.03/dozen while FNS used \$0.93/dozen; IOM calculated whole-grain bread at \$1.80/lb while FNS used \$1.422/lb).

¹⁴⁰ Compare TIME FOR A CHANGE, *supra* note 29, at 342–349 (Table E-3A and Table E3B) with 72 Fed. Reg., *supra* note 116, at 69,022 (Table 6) (IOM calculated infant food fruits and vegetables at \$0.12/oz while FNS used \$0.122/oz; IOM calculated infant food meat at \$0.29/oz while FNS used \$0.34/ounce; IOM calculated whole milk at \$0.73/qt while FNS used \$0.767/qt.; IOM calculated reduced fat milk at \$0.69/qt. while FNS used \$0.708, IOM calculated juice at \$0.03/oz while FNS used \$0.032/oz; IOM calculated dry beans at \$0.77/lb while FNS used

proposed cost reductions suggested by IOM, deciding instead to leave more than the recommended amount of formula for partially-breastfeeding mothers and to include infant eligibility for food package III.¹⁴¹ These conservative calculations couple with reductions in cost savings resulted in the unfortunate cuts to the fruit and vegetable voucher benefits. WIC participants understand that “[e]ating healthy costs a lot of money,”¹⁴² and by underfunding the most significant and fundamental paradigm-shift in the WIC program since its inception, FNS has highlighted a potential weakness of its policy of serving as many eligible participants as possible¹⁴³

Restrictions: dark green and orange vegetables

FNS also considered further restrictions on the uses of the fruit and vegetable vouchers. FNS considered and adopted a number of non-controversial restrictions which, while limiting the applicability of the fruit and vegetable benefits, seek to encourage consumption of foods with high nutritional value and still maintain a vast variety of foods suitable to many cultures.¹⁴⁴ FNS

\$0.805/lb, IOM calculated tuna at \$0.09/oz while FNS used \$0.101/oz; and IOM calculated other canned fish at \$0.11/oz while FNS used \$0.114/oz).

¹⁴¹ 72 Fed. Reg., *supra* note 116, at 68,967.

¹⁴² Hiran Ratnayake, *Milk could take a back seat to fruit*, THE NEWS JOURNAL (Wilmington, DE), Nov. 5, 2006, at 1A, (quoting Melynda Montes, a 28 year old mother of three and WIC and Food Stamps participant from Wilmington, DE). The article also noted the marked price difference between produce and other, less healthy options: “[a]t grocers close to the Montes’ home, strawberries cost \$2.50 to \$3 a pound; cantaloupes are \$3 and \$3.50; seedless white grapes sell for \$2.99 a pound. But three fried chicken thighs cost \$1. . . . They also know fruits and salads are not as filling as some unhealthy foods.” *Id.*

¹⁴³ 72 Fed. Reg., *supra* note 116, at 68,974 (refusing to include yogurt as a dairy substitute because “[i]t is important that revisions to the WIC food packages be cost neutral to protect the program’s ability to serve the greatest number of eligible women, infants, and children.”). See Besharov and Germanis, *supra* note 54, at 32 (arguing for WIC to focus on the most needy families instead of trying to include as many participants as possible and to “allow states, at least on an experimental basis, to increase the size of the food package for the most needful families” and potentially reduce or eliminate benefits for higher income earners currently enrolled in WIC).

¹⁴⁴ 72 Fed. Reg., *supra* note 116, at 68,994. The interim rule does not allow the fruit and vegetable benefit to be redeemed for:

Herbs or spices; edible blossoms and flowers, e.g., squash blossoms (broccoli, cauliflower and artichokes are allowed); creamed or sauced vegetables; vegetable-grain (pasta or rice) mixtures; fruit-nut mixtures; breaded vegetables; fruits and vegetables for purchase on salad bars; peanuts; ornamental and decorative fruits and vegetables such as chili peppers on a string; garlic on a string; gourds; painted pumpkins; fruit baskets and party vegetable trays; and items such as

considered but rejected a provision which would limit this benefit to only dark green and orange vegetables. This decision correctly ensures a diversity of items, allows for simpler implementation by vendors and point of sale workers administering the program at the retail level, and allows for increased cultural preferences. While WIC-eligible women and children in households at or below 131 percent of the poverty line consume almost zero servings of dark green leafy vegetables daily on average (despite USDA's recommendation that children consume two to four servings weekly and women consume six servings weekly), coupling increased consumer choice with improved nutritional education and the fruit and vegetable voucher itself should help to remedy this deficiency without artificially constricting the choices available through this benefit.¹⁴⁵

Restrictions: white potatoes

FNS, following the IOM's recommendation, did choose to exclude a popular and nutrient-rich food from the new fruit and vegetable benefit: all potatoes except for orange yams and sweet potatoes.¹⁴⁶ The IOM committee cited a Kaiser study from 2003 which concluded that certain core foods, such as white potatoes and white rice, would still be accessible to WIC participants even if they were not included in the revised food packages.¹⁴⁷ IOM also noted that women over the age of 12 and children between the ages of two and five in households earning under 131 percent of the poverty line were ingesting more than the weekly number of servings

blueberry muffins and other baked goods are not authorized. Mature legumes (dry beans and peas) and juices are provided as separate food WIC categories and are not authorized under the fruit and vegetable category.

Id. Also not included are "catsup or other condiments; pickled vegetables, olives; soups; juices; and fruit leathers and fruit roll-ups." *Id.*

¹⁴⁵ *Id.* at 68,970 (stating that "This alternative was rejected because FNS believes that WIC food packages that reflect the IOM recommendations as closely as possible within the constraints of cost neutrality best reflect current scientific consensus on how to meet the supplemental dietary needs of WIC participants."). Most comments received on this issue favored a wide and diverse availability of fruits and vegetables and disfavored a restriction such as the dark green and orange rule, *id.* See also TIME FOR A CHANGE, *supra* note 29, at 66–67 (Table 2-8).

¹⁴⁶ 72 Fed. Reg., *supra* note 116, at 68,971. See also TIME FOR A CHANGE, *supra* note 29, at 118.

¹⁴⁷ TIME FOR A CHANGE, *supra* note 29, at 41.

recommended by USDA.¹⁴⁸ Oddly, IOM also defended the exclusion of white potatoes because the tuber is the most widely-available vegetable.¹⁴⁹ While encouraging WIC participants to include a diverse variety of fruits and vegetables in their diets through nutrition education and other means should be a priority, excluding one of the most popular and nutrition-packed vegetables because of its wide availability and overconsumption by some WIC participants is an unfortunate error.

Potatoes are nutrient rich and, when properly prepared without adding excess fats or condiments, can contribute to a well-rounded and healthful diet. A potato's fat content is roughly two-tenths of one percent, making the vegetable nearly fat free.¹⁵⁰ A medium-sized potato has roughly the same number of calories as large apple or pear: only about 100.¹⁵¹ About 500 grams of boiled potatoes exceeds an adult's daily requirement of vitamin C and potassium, helping to overcome key deficiencies in the WIC population.¹⁵² Other grains like wheat or rice lack vitamin C completely.¹⁵³ The same amount of potatoes is also a good source of calcium, nitrogen and nicotinic acid, and provides 41.6 percent of an adult's daily requirement of iron, 25 percent of daily phosphorus, and 40 percent of thiamin (vitamin B1).¹⁵⁴ Potatoes are also a good source of niacin (vitamin B5), riboflavin (vitamin B2), and vitamin B6.¹⁵⁵ While potatoes are low in

¹⁴⁸ *Id.* at 66–67 (Table 2-8) (finding that children ages two to five were consuming 3.4 to 5.4 additional servings of potatoes and starchy vegetables than recommended by USDA, that women ages 12 to 19 were consuming 3.1 additional servings of potatoes and starchy vegetables than recommended by USDA, and that women ages 20 to 39 were consuming 0.3 additional servings of potatoes and starchy vegetables than recommended by USDA).

¹⁴⁹ TIME FOR A CHANGE, *supra* note 29, at 119. FNS concurred with this reasoning. *See* 72 Fed. Reg., *supra* note 116, at 68,971.

¹⁵⁰ JAMES J. LANG, NOTES OF A POTATO WATCHER 34 (Texas A&M Univ. P. 2001).

¹⁵¹ *Id.*

¹⁵² *Id.* at 35. Estimates are based on half a kilo of potatoes, peeled and boiled.

¹⁵³ *Id.* at 35.

¹⁵⁴ *Id.* at 35–36. Estimates are based on half a kilo of potatoes, unpeeled, boiled, and eaten with the skin. Potatoes are also a good source of ascorbic acid, which helps prevent against scurvy. *Id.*

¹⁵⁵ *Id.* at 36.

protein, the amount they do contain is rich with amino acids.¹⁵⁶ Potatoes are also an essential part of low-sodium diets, as they contain little salt but a high level of potash and alkaline salts and help to correct for acidity in diets.¹⁵⁷ Other grains like rice, which is nearly nutrient-free,¹⁵⁸ and even other fruits and vegetables, like apples, cannot make claims anywhere near as beneficial as a potato.

Over 300 commenters submitted requests to FNS to keep potatoes in the revised WIC food packages.¹⁵⁹ Many of those cited the health benefits of potatoes as well as their wide appeal, versatility, and economical nature.¹⁶⁰ Critics of the decision are also worried that banning potatoes from the food packages could send a message to WIC participants that potatoes are not healthy.¹⁶¹ Including all potatoes, not just sweet potatoes and yams, comports with IOM's own six-pronged criteria for determining which foods should be included in the revised food packages:¹⁶² white potatoes are extremely suitable for low-income households that may lack the ability to refrigerate or store other produce with similar nutrient value, they are commonly consumed (so much so that IOM and FNS deemed this as a detriment), and the exclusion of white potatoes would impact WIC participants' choices as well as add administrative complexity for vendors and WIC agencies. While some WIC participants over-utilize white potatoes or prepare them in unhealthy ways (such as by cutting and frying instead of baking or boiling in the skin), nutrition education and not removal from the program should be the solution. IOM and

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 31.

¹⁵⁹ 72 Fed. Reg., *supra* note 116, at 68,971. 324 commenters suggested including white potatoes. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Erika Bolstad, *Help poor moms buy spuds? USDA says no*, IDAHO STATESMEN, May 2, 2008, available at <http://www.idahostatesman.com/business/story/368233>. John Keeling of the National Potato Council stated that USDA is sending "the message—that potatoes aren't good for you— . . . to women as they are learning about nutrition and teaching their children healthy eating habits." *Id.* Keeling also argued that the change tells WIC participants "[w]e favor you using these dollars for purchasing radishes rather than potatoes." *Id.*

¹⁶² See *infra* notes 84–90 and accompanying text.

FNS did not once mention the lack of nutrient value in apples, but 100 grams of apples is a good source of only vitamin C and fiber.¹⁶³ Just like white potatoes, most of the calories in an apple are from carbohydrates, but unlike white potatoes, apples lack useful amounts of iron, phosphorus, niacin, folate, and practically all other vitamins and minerals.¹⁶⁴ Moreover, while some claim that apples are a good source of potassium, 100 grams of apples (approximately one medium apple) only provide three percent of one's daily need of the mineral.¹⁶⁵ Yet the lack of nutritional value in apples and potentially more beneficial sources of vitamin C are not discussed in the IOM report or the interim final rule. The exclusion of white potatoes may lead to participants spending their fruit and vegetable benefits on less-healthy choices while adding a needless level of complexity for point of sale workers and vendors and excluding one of the most popular and potentially-nutritious items from the WIC program.

Members of Congress from potato-producing states opposed the exclusion of white potatoes as well. Senator Mike Crapo (R-ID) and former Senator Larry Craig (R-ID) lobbied to insert "pro-potato" language into a conference committee report for the Food, Conservation, and Energy Act of 2008, commonly referred to as the 2008 Farm Bill.¹⁶⁶ The conference committee's report stated that it supported "the inclusion of *all* fruits and vegetables in the federal nutrition programs where supported by science."¹⁶⁷ While local politics and the importance of the potato industry for the state of Idaho are likely the driving forces behind these lawmakers' passionate

¹⁶³ Nutrition Data, Apples, raw, with skin, <http://www.nutritiondata.com/facts/fruits-and-fruit-juices/1809/2> (last visited Apr. 30, 2009).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* 100 grams of apples have 107mg of potassium, *id*, whereas 100 grams of potatoes, baked with skin, has 535mg of potassium, or 15 percent of one's daily recommended value. Nutrition Data, Potato, baked, flesh and skin, without salt, <http://www.nutritiondata.com/facts/vegetables-and-vegetable-products/2770/2> (last visited Apr. 30, 2009).

¹⁶⁶ Press Release, U.S. Senator Mike Crapo, Idaho Delegation Wins Pro-Potato Language in Farm Bill Compromise (May 13, 2008), *available at* http://crapo.senate.gov/media/newsreleases/release_full.cfm?id=297766.

¹⁶⁷ *Id.* (emphasis added). Senators Crapo and Craig stressed that the exclusion could lead participants to purchase less-healthy options and subject WIC agencies and vendors to "an unnecessary logistical complexity." *Id.*

advocacy for the inclusion of white potatoes in the revised food packages, their position highlights the significant of potatoes in the American diet as well as their nutritive value. If WIC actually saves three dollars for every dollar expended, it seems an easy choice to increase the amounts of the fruit and vegetable benefit while allowing all choices, including white potatoes, which are culturally sensitive, widely available, nutrient rich, low cost and easily storable foodstuffs.

Voucher logistics and inflation adjustment

The interim final rule also provides that the fruit and vegetable voucher amounts retain a constant value as market forces affect the price of produce. FNS added a provision to the interim final rule, urged by 124 commenters, that adjusts the voucher on a yearly basis to keep up with inflation.¹⁶⁸ FNS balanced the interests of WIC participants with that of efficient administration and tied the maximum value of the voucher to the Bureau of Labor Statistics' Consumer Price Index for Fresh Fruits and Vegetables using only whole-dollar increments.¹⁶⁹ Adjusting the benefit more frequently would likely not have resulted in much of a net benefit for participants due to the increased administrative costs to perform this adjustment and the decision to round the benefit amount to a whole dollar. Nonetheless, the decision to round the benefit amount to a whole dollar is somewhat troubling, as FNS has chosen to always round the benefit down to the next lowest multiple of \$1 so long as that value is not lower than the amount of the voucher

¹⁶⁸ 72 Fed. Reg., *supra* note 116, at 68,970.

¹⁶⁹ WIC Program Regulations, 7 C.F.R. 246.16(j). *See also, id.* Tying the price of the vouching to the specific fruit and vegetable index, and not to the overall Consumer Price Index, is significant, as fruit and vegetable prices are known to increase and decrease at different rates and intervals than other goods. *See* Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (CPI-U), February 2009, (Mar. 18, 2009), *available at* http://www.bls.gov/news.release/archives/cpi_03182009.pdf, noting that “[t]he fruits and vegetables index was the only major grocery store food group to post an increase, rising 0.4 percent in February.”

during the previous year.¹⁷⁰ Therefore, if the inflation adjustment calculus produces a value of \$6.99 for the fruit and vegetable benefit for children, the rounding provision would reduce that estimated benefit by 16.5 percent to the next lowest multiple of \$1, or \$6. Reducing this already relatively small benefit's purchasing power by up to 16.5 percent for an entire year until the next October 1 reset date could stifle the potential benefits of this program and reduce the fruit and vegetable benefit to levels thought insufficient by the IOM.

Also troubling is the decision to use CPI numbers for the prior 12 months, ending March 31 of each year.¹⁷¹ The seven-month lag between the date of the applicable CPI calculation and the implementation of the adjusted benefit price, coupled with the blunt rounding mechanism, could result in a substantial decrease in the fruit and vegetable voucher that would require additional action on the part of USDA to correct.

Nonetheless, the rule does allow a WIC participant to pay for any fruits or vegetables that exceed the voucher amount with cash, although the voucher has no cash refund value for any unused portions, which could undermine the goals of encouraging increased consumption of fresh, canned, and frozen fruits and vegetables.¹⁷² Finally, the rule mandates that all vendors stock at least two different varieties of fruits and two different varieties of vegetables.¹⁷³

Other Changes

¹⁷⁰ 72 Fed. Reg., *supra* note 116, at 68,997. WIC Program Regulations, 7 C.F.R. 246.6(j)(5) ("If any increase in the cash value of the voucher . . . is not a multiple of \$1, such increase shall be rounded to the next lowest multiple of \$1. However, if the adjusted value of the voucher for the adjustment year . . . is lower than the adjusted value for the fiscal year immediately prior to the adjustment year, then the adjusted value of the voucher will remain unchanged.").

¹⁷¹ 72 Fed. Reg., *supra* note 116, at 68,997. WIC Program Regulations, 7 C.F.R. 246.6(j)(4) ("The inflation adjustment of the fruit and vegetable voucher shall equal the percentage (if any) by which the annual average value of the Consumer Price Index for fresh fruits and vegetables, computed from monthly values published by the Bureau of Labor Statistics, for the twelve months ending on March 31 of the fiscal year immediately prior to the adjustment year, exceeds the average of the monthly values of that index for the twelve months ending on March 31, 2007.").

¹⁷² 72 Fed. Reg., *supra* note 116, at 68,971.

¹⁷³ WIC Program Regulations, 7 C.F.R. 246.12(g)(3)(i).

While the addition of fruits and vegetables to the WIC food packages are the most significant aspect of the interim final rule, FNS included other significant alterations and additions. Peanut butter and legumes were added to food package VI and canned beans were added as an alternative in all food packages with this benefit. Despite concerns over peanut allergies and the potential choking hazard caused by young children eating peanut butter with a spoon, this change encourages a greater diversity of foodstuffs and allows a greater number of WIC participants to access the key nutrients in these foods.¹⁷⁴

To maintain cost-neutrality when implementing these changes, FNS reduced that quantity of dairy products available to WIC participants. Milk is reduced in every package which includes the beverage to levels which more closely mimic federal dietary guidelines: “for children and postpartum women, from 24 quarts to 16 quarts; for pregnant and partially breastfeeding women, from 28 to 22 quarts; and for fully breastfeeding women, from 28 quarts to 24 quarts of milk.”¹⁷⁵ FNS also altered the standards for fat content in milk to encourage children to move away from whole milk earlier in their development.¹⁷⁶ To reduce the intake of saturated fat and cholesterol, the amount of cheese in WIC food packages which could replace milk was also reduced “to one pound per month for children and pregnant, postpartum and partially breastfeeding women, and two pounds for fully breastfeeding women.”¹⁷⁷ To further cut program expenditures, eggs would also be reduced “from the current 2 or 2 [and] 1/2 to 1 dozen fresh shell eggs for children and

¹⁷⁴ 72 Fed. Reg., *supra* note 116, at 68,972. “The IOM advised that children should avoid eating peanut butter from a spoon for safety reasons until age 3 . . . IOM has advised FNS that assessing for allergies and tailoring a young child’s food package based on such assessment, as is current practice in WIC, is appropriate.” *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 68,973. “[The] interim rule will authorize whole milk for children 1 through 4 years of age and women in Food Package III, with medical documentation . . . [and] only milk with no more than 2% milk fat is authorized for children 2 years of age and older and women in Food Packages IV–VII.” *Id.*

¹⁷⁷ *Id.*

women in Food Packages IV, V, and VI.”¹⁷⁸ The Dairy industry vocally objected to the cuts, as the WIC program currently accounts for six percent of the nation’s annual milk sales,¹⁷⁹ three percent of all cheese sales,¹⁸⁰ and 3.5 percent of all egg sales.¹⁸¹ FNS also added tofu and soy-based beverages as potential replacement options for the milk allotment (so long as they met minimum nutrient standards¹⁸²), but unfortunately refused to include the IOM’s recommendation of yogurt as a milk substitute, which is more culturally acceptable to some groups than milk or cheese and better tolerated by those with lactose maldigestion,¹⁸³ due to cost-neutrality concerns.¹⁸⁴

Another popular addition to the WIC food packages are products made from whole grains. IOM stressed the need to increase dietary intake of fiber and other nutrients which are commonly derived from whole grains. FNS responded to these concerns in the interim final rule, which “established a whole grain requirement for breakfast cereal in Food Packages III–VII and added whole wheat bread or other whole grain options for children and pregnant and breastfeeding women in Food Packages III, IV, V and VII.”¹⁸⁵ To increase cultural acceptability, the rule allows for “brown rice, bulgur (cracked wheat), oatmeal, and barley (whole-grain) . . . and . . . soft corn and whole wheat tortillas” so long as they are unprocessed or have whole-grains as their first ingredient by weight.¹⁸⁶ Finally, the interim final rule sought to respond to

¹⁷⁸ *Id.* at 68,974. “For fully breastfeeding women in Food Package VII, the maximum monthly allowance was proposed at 2 dozen eggs.” *Id.*

¹⁷⁹ Frederic J. Frommer, *Dairy Farmers Fearful of WIC Program*, FOXNEWS.COM, Dec. 1, 2006, <http://www.foxnews.com/wires/2006Dec01/0,4670,WICFarmers,00.html>.

¹⁸⁰ *Id.*

¹⁸¹ Philip Brasher, *WIC changes would hit farmers*, DES MOINES REGISTER, Sept. 19, 2006, at 1A.

¹⁸² See 72 Fed. Reg., *supra* note 116, at 68,973.

¹⁸³ TIME FOR A CHANGE, *supra* note 29, at 119. “[Yogurt] may be viewed by some participants as [a] more acceptable source[] of calcium (and vitamin D in some cases) for WIC participants with milk allergies and lactose maldigestion and for those who avoid milk for cultural, religious, or other reasons.” *Id.* at 119–120.

¹⁸⁴ 72 Fed. Reg., *supra* note 116, at 68,974.

¹⁸⁵ *Id.* at 68,975. 17,165 comment letters supported this addition, with fewer than 200 opposing it. *Id.*

¹⁸⁶ *Id.* at 68,976.

concerns about mercury levels in the canned fish authorized by the pre-2007 food packages by including only fish with lower levels of mercury and adding canned mackerel.¹⁸⁷

Conclusion: Fundamental but insufficient

While many agree that the changes to the WIC food packages are a welcome innovation for a vital program¹⁸⁸, they unfortunately do not go far enough, partly because the changes fail to

¹⁸⁷ *Id.* IOM found that, along with mackerel, “canned light tuna, salmon, and sardines are among those fish that are lower in mercury.” *Id.* The rule does not authorize albacore tuna due to its moderate to high levels of mercury and only two commenters objected to this omission. *Id.* For a general discussion of the issue of mercury in canned fish products and the potential risks to pregnant and nursing WIC participants, see Katharine Mieszkowski, *Tuna meltdown*, SALON.COM, Jun. 22, 2006, <http://www.salon.com/news/feature/2006/06/22/tuna/>.

¹⁸⁸ The FNS has delayed the mandatory implementation of the interim final rule. State agencies must fully implement the revisions in the WIC Food Packages by no later than October 1, 2009. See Revisions in the WIC Food Packages; Delay of Implementation Date, 73 Fed. Reg. 14,153, 14,153 (2008).

For the complete listing of the recalibrated food packages, see 72 Fed. Reg., *supra* note 116, at 68,989–68,991 (Table 1–Table 3) (reproduced below):

TABLE 1.—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR INFANTS IN FOOD PACKAGES I, II AND III						
Foods ¹	Fully formula fed (FF)		Partially breastfed (BF/FF)		Fully breastfed (BF)	
	Food packages I-FF & III-FF A: 0 through 3 months B: 4 through 5 months	Food packages II-FF & III-FF 6 through 11 months	Food packages I-BF/FF & III BF/FF A: 0 to 1 month ² B: 1 through 3 months ² C: 4 through 5 months	Food packages II-BF/FF & III BF/FF through 11 months	Food package I-BF 0 through 5 months	Food package II-BF 6 through 11 months
WIC Formula ^{4,5,6,7} ..	A: 806 fl oz reconstituted liquid concentrate or 832 fl oz RTF or 870 fl oz reconstituted powder. B: 884 fl oz reconstituted liquid concentrate or 896 fl oz RTF or 960 fl oz reconstituted powder.	624 fl oz reconstituted liquid concentrate or 640 fl oz RTF or 696 fl oz reconstituted powder	A: 104 fl oz reconstituted powder ³ B: 364 fl oz reconstituted liquid concentrate or 384 fl oz RTF or 435 fl oz reconstituted powder C: 442 fl oz reconstituted liquid concentrate or 448 fl oz RTF or 522 fl oz reconstituted powder	312 fl oz reconstituted liquid concentrate or 320 fl oz RTF or 384 fl oz reconstituted powder		
Infant cereal ⁸ .....	.....	24 oz .....	.....	24 oz .....	.....	24 oz.
Infant food fruits and vegetables ^{8,9,10} .....	.....	128 oz .....	.....	128 oz .....	.....	256 oz.
Infant food—meat ^{8,10} .....	.....	.....	.....	.....	.....	77.5 oz.

Table 1 Footnotes: (abbreviations in order of appearance in table): FF = fully formula fed; BF/FF = partially breastfed (i.e., the infant is breastfed but also receives formula from the WIC Program); BF = fully breastfed (i.e., the infant receives no formula through the WIC program).

¹ Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications for the supplemental foods.

² The powder form is the form recommended for partially breastfed infants ages 0 through 3 months in Food Package I.

³ Liquid concentrate and ready-to-feed (RTF) may be substituted at rates that provide comparable nutritive value.

⁴ WIC formula means infant formula, exempt infant formula, or WIC-eligible medical food. Only infant formula may be issued for infants in Food Packages I and II. Exempt infant formula may only be issued for infants in Food Package III.

⁵ The maximum monthly allowance is specified in reconstituted fluid ounces for liquid concentrate, RTF liquid, and powder forms of infant formula and exempt infant formula. Reconstituted fluid ounce is the form prepared for consumption as directed on the container.

⁶ If powder infant formula is provided, State agencies must provide at least the number of reconstituted fluid ounces as the maximum allowance for the liquid concentrate form of the same product in the same Food Package up to the maximum monthly allowance for powder. State agencies must issue whole containers that are all the same size.

⁷ State agencies may round up and disperse whole containers of infant formula over the food package timeframe to allow participants to receive the full authorized nutritional benefit (FNB). State agencies must use the methodology described in accordance with paragraph (h)(1) of this section.

⁸ State agencies may round up and disperse whole containers of infant foods (infant cereal, fruits and vegetables, and meat) over the Food Package timeframe. State agencies must use the methodology described in accordance with paragraph (h)(2) of this section.

⁹ Fresh banana may replace up to 16 ounces of infant food fruit at a rate of 1 pound of bananas per 8 ounces of infant food fruit.

¹⁰ In lieu of infant foods (cereal, fruit and vegetables, and meat), infants greater than 6 months of age in Food Package III may receive exempt infant formula or WIC-eligible medical foods at the same maximum monthly allowance as infants ages 4 through 5 months of age of the same feeding option.

Id.

TABLE 2.—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR CHILDREN AND WOMEN IN FOOD PACKAGES IV, V, VI AND VII

Foods ¹	Children	Women		
	Food package IV 1 through 4 years	Food package V: Pregnant and partially breastfeeding (up to 1 year postpartum) ²	Food package VI: Postpartum (up to 6 months postpartum) ³	Food package VII: Fully breastfeeding (up to 1 year post-partum) ^{4 5}
Juice, single strength ⁶	128 fl oz	144 fl oz	96 fl oz	144 fl oz.
Milk, fluid	16 qt. ^{7 8 9 10}	22 qt. ^{7 8 11 12}	16 qt. ^{7 8 11 12}	24 qt. ^{7 8 11 12}
Breakfast cereal ¹³	36 oz	36 oz	36 oz	36 oz.
Cheese	N/A	N/A	N/A	1 lb.
Eggs	1 dozen	1 dozen	1 dozen	2 dozen.
Fruits and vegetables ^{14 15}	\$6.00 in cash value vouchers.	\$8.00 in cash-value vouchers.	\$8.00 in cash-value vouchers.	\$10.00 in cash-value vouchers.
Whole wheat bread or other whole grains ¹⁶	2 lb	1 lb	N/A	1 lb.
Fish (canned)	N/A	N/A	N/A	30 oz.
Legumes, dry ¹⁷	1 lb	1 lb	1 lb	1 lb.
And/or peanut butter	Or 18 oz	And 18 oz	Or 18 oz	And 18 oz.

Table 2 Footnotes: N/A = the supplemental food is not authorized in the corresponding food package.

¹ Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications for the supplemental foods.

² Food Package V is issued to two categories of WIC participants: Women participants with singleton pregnancies and breastfeeding women whose partially breastfed infants receive formula from the WIC Program in amounts that do not exceed the maximum formula allowances for Food Packages I-BF/FF-A, I-BF/FF-B, I-BF/FF-C, or II-BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

³ Food Package VI is issued to two categories of WIC participants: Non-breastfeeding postpartum women and breastfeeding postpartum women whose partially breastfed infants receive more than the maximum infant formula allowances for Food Packages I-BF/FF-A, I-BF/FF-B, I-BF/FF-C or II-BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

⁴ Food Package VII is issued to three categories of WIC participants: Fully breastfeeding women whose infants do not receive formula from the WIC Program; women pregnant with two or more fetuses; and women fully or partially breastfeeding multiple infants.

⁵ Women fully breastfeeding multiple infants are prescribed 1.5 times the maximum allowances.

⁶ Combinations of single-strength and concentrated juices may be issued provided that the total volume does not exceed the maximum monthly allowance for single-strength juice.

⁷ Whole milk, as specified in FDA standards, is the only type of milk allowed for 1-year-old children (12 through 23 months). Reduced fat milks, as specified in FDA standards, i.e., 2% milk fat, are the only types of milk allowed for children ≥ 24 months of age and women.

⁸ Evaporated milk may be substituted at the rate of 16 fluid ounces of evaporated milk per 32 fluid ounces of fluid milk or a 1:2 fluid ounce substitution ratio. Dry milk may be substituted at an equal reconstituted rate to fluid milk. When a combination of different milk forms is provided, the full maximum monthly fluid milk allowance must be provided.

⁹ For children, cheese may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk. No more than 1 lb. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese may be substituted in cases of lactose intolerance or other qualifying conditions, up to the maximum allowance for fluid milk.

¹⁰ For children, soy-based beverage and calcium-set tofu may be substituted for milk only with medical documentation for qualifying conditions. Soy-based beverage may be substituted for milk, with medical documentation, for children in Food Package IV on a quart for quart basis up to the total maximum allowance of milk. Tofu may be substituted for milk, with medical documentation, for children in Food Package IV at the rate of 1 pound of tofu per 1 quart of milk up to the total maximum allowance of milk.

¹¹ For women, cheese or calcium-set tofu may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk or 1 pound of tofu per 1 quart of milk. A maximum of 4 quarts of milk can be substituted in this manner in Food Packages V and VI; however, no more than 1 pound of cheese may be substituted for milk. A maximum of 6 quarts of milk can be substituted in this manner in Food Package VII; therefore, no more than 2 lbs. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese or tofu may be substituted, up to the maximum allowances for fluid milk, in cases of lactose intolerance or other qualifying conditions.

¹² For women, soy-based beverage may be substituted for milk at the rate of 1 quart of soy-based beverage for 1 quart of milk up to the total maximum monthly allowance of milk.

¹³ At least one-half of the total number of breakfast cereals on the State agency's authorized food list must have whole grain as the primary ingredient and meet labeling requirements for making a health claim as a "whole grain food with moderate fat content" as defined in Table 4 of paragraph (e)(12) of this section.

¹⁴ Processed (canned, frozen, dried) fruits and vegetables may be substituted for fresh fruits and vegetables. Dried fruit and dried vegetables are not authorized for children in Food Package IV.

¹⁵ The monthly value of the fruit/vegetable cash-value vouchers will be adjusted annually for inflation as described in §246.16(j).

¹⁶ Brown rice, bulgur (cracked wheat), oatmeal, whole-grain barley, soft corn or whole wheat tortillas may be substituted for whole wheat bread on an equal weight basis.

¹⁷ Canned legumes may be substituted for dried legumes at the rate of 64 oz. of canned beans for 1 lb. dried beans. Under Food Packages V and VII, two additional combinations of dry or canned beans/peas are authorized: 1 lb. Dry and 64 oz. Canned beans/peas (and no peanut butter); or 2 lb. Dry or 128 oz. Canned beans/peas (and no peanut butter) or 36 oz. peanut butter (and no beans).

address one of the key underlying problems: the yoke of serving as many participants as possible, even if funding could be better allocated by serving more needy participants with a

TABLE 3.—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR CHILDREN AND WOMEN IN FOOD PACKAGE III				
Foods ¹	Children	Women		
	1 through 4 years	Pregnant and partially breastfeeding (up to 1 year postpartum) ²	Postpartum (up to 6 months postpartum) ³	Fully breastfeeding, (up to 1 year post-partum) ^{4,5}
Juice, single strength ⁶ .	128 fl oz	144 fl oz	96 fl oz	144 fl oz.
WIC Formula ^{7,8}	455 fl oz liquid concentrate	455 fl oz liquid concentrate	455 fl oz liquid concentrate	455 fl oz. liquid concentrate.
Milk	16 qt ^{9,10,11,12}	22 qt ^{9,10,13,14}	16 qt ^{9,10,13,14}	24 qt. ^{9,10,13,14}
Breakfast cereal ^{15,16} .	36 oz	36 oz	36 oz	36 oz.
Cheese	N/A	N/A	N/A	1 lb.
Eggs	1 dozen	1 dozen	1 dozen	2 dozen.
Fruits and vegetables ^{17,18} .	\$6.00 in cash value vouchers.	\$8.00 in cash value vouchers.	\$8.00 in cash value vouchers.	\$10.00 in cash value vouchers.
Whole wheat bread ¹⁹ .	2 lb	1 lb	N/A	1 lb.
Fish (canned)	N/A	N/A	N/A	30 oz.
Legumes, dry ²⁰	1 lb	1 lb	1 lb	1 lb.
and/or Peanut butter.	Or 18 oz	And 18 oz	Or 18 oz	And 18 oz.

Table 3 Footnotes: N/A=the supplemental food is not authorized in the corresponding food package.
¹ Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications for the supplemental foods.
² Food Package V is issued to two categories of WIC participants—women participants with singleton pregnancies and breastfeeding women whose partially breastfed infants receive formula from the WIC Program in amounts that do not exceed the maximum formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C, or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.
³ Food Package VI is issued to two categories of WIC participants—non-breastfeeding postpartum women and breastfeeding postpartum women whose partially breastfed infants receive more than the maximum formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.
⁴ Food Package VII is issued to three categories of WIC participants—fully breastfeeding women whose infants do not receive formula from the WIC Program; women pregnant with two or more fetuses; and women fully or partially breastfeeding multiple infants.
⁵ Women fully breastfeeding multiple infants are prescribed 1.5 times the maximum allowances.
⁶ Combinations of single-strength and concentrated juices may be issued provided that the total volume does not exceed the maximum monthly allowance for single-strength juice.
⁷ WIC formula means infant formula, exempt infant formula, or WIC-eligible medical food.
⁸ Powder and Ready-to-Feed may be substituted at rates that provide comparable nutritive value.
⁹ Whole milk, as specified in FDA standards, is the only type of milk allowed for 1-year-old children (12 through 23 months). Reduced fat milks, as specified in FDA standards, i.e., 2% milk fat, are the only types of milk allowed for children > 24 months of age and women. With medical documentation, whole milk may be substituted for reduced fat milk for children > 24 months of age and women.
¹⁰ Evaporated milk may be substituted at the rate of 16 fluid ounces of evaporated milk per 32 fluid ounces of fluid milk or a 1:2 fluid ounce substitution ratio. Dry milk may be substituted at an equal reconstituted rate to fluid milk. When a combination of different milk forms is provided, the full maximum monthly fluid milk allowance must be provided.
¹¹ For children, cheese may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk. No more than 1 lb. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese may be substituted in cases of lactose intolerance or other qualifying conditions, up to the maximum allowance for fluid milk.
¹² For children, soy-based beverage and tofu may be substituted for milk only with medical documentation for qualifying conditions. Soy-based beverage may be substituted for milk, with medical documentation, for children in Food Package IV on a quart for quart basis up to the total maximum allowance of milk. Tofu may be substituted for milk, with medical documentation, for children in Food Package IV at the rate of 1 pound of tofu per 1 quart of milk up to the total maximum allowance of milk.
¹³ For women, cheese or calcium-set tofu may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk or 1 pound of tofu per 1 quart of milk. A maximum of 4 quarts of milk can be substituted in this manner in Food Packages V and VI; however, no more than 1 pound of cheese may be substituted for milk. A maximum of 6 quarts of milk can be substituted in this manner in Food Package VII; therefore, no more than 2 lbs. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese or tofu may be substituted, up to the maximum allowances for fluid milk, in cases of lactose intolerance or other qualifying conditions.
¹⁴ For women, soy-based beverage may be substituted for milk at the rate of 1 quart of soy-based beverage for 1 quart of milk up to the total maximum monthly allowance of milk.
¹⁵ 32 dry ounces of infant cereal may be substituted for 36 ounces of breakfast cereal.
¹⁶ At least one half of the total number of breakfast cereals on the State agency's authorized food list must have whole grain as the primary ingredient and meet labeling requirements for making a health claim as a "whole grain food with moderate fat content" as defined in Table 4 of paragraph (e)(12) of this section.
¹⁷ Processed (canned, frozen, dried) fruits and vegetables may be substituted for fresh fruits and vegetables. Dried fruit and dried vegetables are not authorized for children.
¹⁸ The monthly value of the fruit/vegetable cash-value vouchers will be adjusted annually for inflation as described in § 246.16(j).
¹⁹ Brown rice, bulgur (cracked wheat), oatmeal, whole-grain barley, soft corn or whole wheat tortillas may be substituted for whole wheat bread on an equal weight basis.
²⁰ Canned legumes may be substituted for dried legumes at the rate of 64 oz of canned beans for 1 lb dried beans. Issuance of two additional combinations of dry or canned beans/peas is authorized for the Pregnant and Partially Breastfeeding (up to 1 year postpartum) category and Fully Breastfeeding (Enhanced) (up to 1 year postpartum) category: 1 lb. Dry and 64 oz. Canned beans/peas (and no peanut butter); or 2 lb. Dry or 128 oz. Canned beans/peas (and no peanut butter) or 36 oz. Peanut butter (and no beans).

Id.

higher level of assistance. While the changes help to increase cultural sensitivity and wider cultural acceptance of available foods in the WIC program, the decision to exclude white potatoes and yogurt and, to some extent, rice, from the revised food packages raises doubts as to whether FNS took this guiding principle seriously when developing these changes. Moreover, the decisions to implement a smaller than recommended fruit and vegetable benefit, exclude certain culturally-acceptable substitution items, and cut dairy to keep the program cost-neutral, are premised on the need to enroll as many participants in the program as funding levels allow. While this goal is admirable, it may not be the most strategically beneficial for the program or for those with the greatest need. WIC should once again focus more on meeting all of the needs of those with actual demonstrated nutritional risk and participants in high-risk sub groups. Agencies responsible for federal feeding programs have fallen into the dangerous pattern of assuming that all potential participants at or below 185 percent of the poverty line are at nutritional risk by default.¹⁸⁹ Moreover, lax rules about adjunctive eligibility have also expanded participant roles beyond those who need supplemental assistance. Cost savings earned by states through purchase agreements and administrative reductions have been consistently reinserted into the program for expanding participant roles more often than for remedying the deficits of the program for the neediest participants.¹⁹⁰ Because all participants must receive the same package amounts regardless of their household income or nutritional risk,¹⁹¹ states are unable to tailor their programs to meet the needs of their most at-risk participants while, at the same time, possibly wasting precious WIC funds on participants who do not need the same levels of supplemental nutritional support. More importantly, studies have proven the intuition that WIC

¹⁸⁹ Besharov and Germanis, *supra* note 54, at 21; *see also* Besharov and Call, *supra* note 46, at 9.

¹⁹⁰ Besharov and Germanis, *supra* note 54, at 25.

¹⁹¹ *See id.* at 64 (stating that “WIC agencies are prohibited from expanding the amount of the food packages given.”).

helps its neediest participants much more so than families with higher incomes who nonetheless qualify under the current framework.¹⁹²

Future changes should be made to the WIC program. Eligibility standards should be strictly enforced and the practice of adjunctive eligibility should be reassessed. States should be allowed to increase food packages or funding of nutritional counseling for those at greater nutritional risk. FNS should consider reducing the total number of participants in WIC from the record-high levels currently enrolled in the program and focus instead on meeting the needs of those most at risk. Reducing the number of participants with lower or no demonstrated risk could allow for increasing the voucher amount of the fruit and vegetable benefit, in accordance with IOM recommendations. Such a reallocation could also result in the availability of more culturally-acceptable substitution options, such as yogurt and white potatoes, and an increase in the allotment of whole grain foodstuffs in the WIC packages. Moreover, more funds could be allocated to nutritional counseling services, which could work to overcome problems with misuse or overuse of foods, such as white potatoes, and could instill a general knowledge of nutrition in participants.

FNS and USDA have made great strides with these changes to the WIC food packages, but more must be done to ensure that this critical federal supplemental feeding program effectively and efficiently serves the nutritional needs of at-risk pregnant women, mothers, children, and infants for years to come.

¹⁹² *Id.* at 64, 26–34.

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